CLERK'S COPY 16193

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 138.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1900.
CERTIORARI AND RETURN FILED NOVEMBER 6, 1900.

(17,523.)

( )

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 409.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

JAMES HOLLY, Complainant, Appellee,
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, &c., Defendant, Appellant.

Certified copy.

Transcript of Record.

Appeal from the circuit court of the United States for the southern district of New York.

b *Stipulations.*

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY, Complainant,
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY and E. Walter Roberts, Defendants.

It is hereby stipulated that the paper hereto annexed, marked "A," is a true and correct copy of a letter addressed by Julien T. Davies, Esq., to Messrs. Hannis, Parrish and Williams, of Philadelphia, Pennsylvania, dated November 13, 1890;

And it is further stipulated that the paper hereto annexed, marked "B," is a true and correct copy of a letter addressed by William C. Hannis, Esq., to Arthur M. Burton, Esq., 504 Walnut street, Philadelphia, dated November 14, 1890.

Dated New York, May 7, 1891.

CEPHAS BRAINERD,
Solicitor for Complainant.
DAVIES, SHORT & TOWNSEND,
Solicitors for Defendants.

"A."

NOVEMBER 13, 1890.

DEAR SIRS: I beg to inform you that at a meeting of the board of managers of the Domestic and Foreign Missionary Society, the following resolution was adopted: "Resolved that the counsel of the board be instructed to advise Mr. James Holly that this board will entertain no proposition which involves the payment of money on account of his claim." The board deferred the consideration of the Rev. Doctor Watson's responsibility in the matter.

I would request you to be good enough to communicate the action of the board to Mr. Burton.

I remain, very truly yours, JULIEN T. DAVIES.

Messrs. Hannis, Parrish & Williams, Drexel building, Philadelphia, Pa.

"B."

PHILADELPHIA, *Nov.* 14, 1890.

Arthur M. Burton, Esq., 504 Walnut street, Philadelphia.

DEAR SIR: On receipt of your letter of yesterday, I wrote to my colleague in New York, enclosing it and requesting him to give me an early reply. His reply to my former letter crossed mine in the mail, and I received it this morning, of which I enclose you a copy.

Yours truly, WM. C. HANNIS.

(Enclosure.)

c Circuit Court of the United States for the Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT Episcopal Church in the United States of America and E. Walter Roberts.

It is hereby stipulated between the parties to this action that the testimony of the several witnesses already examined before the special commissioners appointed herein, and also that hereafter taken by the defendants may be certified by the said commissioners without the signatures of the several witnesses to their depositions, and may be read on the hearing of this action with like force and effect as if the same had been signed by the witnesses. Each of the witnesses being sworn before giving their testimony before such commissioners.

New York, January 26, 1894.

CEPHAS BRAINERD,
Solicitor for Complainant.
DAVIES, STONE & AUERBACH,
Attorneys for Defendants.

d Circuit Court of the United States for the Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT Episcopal Church in the United States of America and E. Walter Roberts.

It is hereby stipulated between the parties to this action, that the testimony of Arthur M. Burton and G. W. Robinson, witnesses on the part of the complainant, and also that of Joshua Kimber and E. Walter Roberts, witnesses on the part of the defendants, taken before Special Examiner William B. Anderson, may be certified by said examiner without the signatures of the several witnesses to their depositions, and may be read on the hearing of this action with like

force and effect as if the same had been signed by the witnesses; each of the witnesses having been sworn before giving their testimony before such examiner.

New York, March 26, 1896.

DAVIES, SHORT & TOWNSEND,
Respondents' Solicitors.

CEPHAS BRAINERD,
Complainant's Solicitor.

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, &c., and E. Walter Roberts.

It is hereby consented that the following exhibits need not be printed, but that the originals thereof marked by the special examiners may be referred to as in evidence upon any hearing of this cause by either party, viz:

D. March 12, 1892. Day book of Henry C. Thompson's transactions.

F 1. March 12, 1892. Copy of Henry C. Thompson's bankbook at Sixth national bank (defendants' exhibit).

6. March 19, 1892. Complainant's exhibit. Certified copy of attachment proceedings, June term, 1890, common pleas, No. 4, Philadelphia county, No. 764, Holly *vs.* Thompson. (This exhibit being part of exhibit also introduced by complainant in rebuttal.)

A. May 21, 1892. Rules of orphans' court of Philadelphia county certified in Philadelphia county. A printed copy of these rules to be furnished to respondent.

Also, the charter of the respondent corporation need not be printed, but may be read on the trial by either party from the Session Laws of the State of New York, or from a certified copy of the charter to be produced on the hearing.

A corresponding stipulation will be made between the parties in regard to some of the exhibits introduced before the New York special examiner.

Dated New York city, September 5, 1896.

DAVIES, SHORT & TOWNSEND,
Respondents' Solicitors.

CEPHAS BRAINERD,
Complainant's Solicitor.

f Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, &c., and E. Walter Roberts.

It is hereby consented that the following exhibits need not be annexed to the return of the special examiners herein, but may be retained in the complainant's possession to be produced at the hearing of this cause, viz.:

D. March 12, 1892. Day book of Henry C. Thompson's transactions.

F 1. March 12, 1892. Copy of Henry C. Thompson's bank book at Sixth national bank (defendants' exhibit).

6. March 19, 1892. Complainant's exhibit. Certified copy of attachment proceedings, June term, 1890, common pleas, No. 4, Philadelphia county, No. 764, Holly *vs.* Thompson. (This exhibit being part of exhibit also introduced by complainant in rebuttal.)

A. May 21, 1892. Rules of orphans' court of Philadelphia county certified in Philadelphia county. A printed copy of these rules to be furnished to respondent.

Dated New York city, Sept. 29, 1896.

DAVIES, SHORT & TOWNSEND,
Respondents' Solicitors.

CEPHAS BRAINERD,
Complainant's Solicitor.

A similar stipulation will be made as to respondents' exhibits.

C. B.

1 *Plaintiff's Bill.*

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY of the Protestant Episcopal Church in the United States of America and E. Walter Roberts. } In Equity.

To the honorable the judges of the circuit court of the United States in and for the southern district of New York:

James Holly, a resident of the city of Philadelphia, and a citizen of the State of Pennsylvania, brings this his bill of complaint against the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation organized under and pursuant to the laws of the State of New York, and having its principal place of business in the city of New York in said State, and E. Walter Roberts, a resident of the city of New York, and a citizen of the State of New York, assistant treasurer of the said Domestic and Foreign Missionary Society.

And thereupon your orator complains and says: That on or about the fifteenth day of May, A. D. 1890, one Henry C.
2 Thompson, an inhabitant of the State of New Jersey, was, and for many years previous thereto had been, doing business as a conveyancer in the city of Philadelphia, and practicing as an attorney and counsellor at law in the courts of the Commonwealth of Pennsylvania, and giving special attention to examining titles and the preparing of deeds and title papers, and making settlements and payments of purchase-moneys intrusted to him for the purpose by and on behalf of purchasers of real estate, and was also at that time, and had been for a number of years prior thereto, the solicitor of the Real Estate Title Insurance and Trust Company, a corporation of the State of Pennsylvania, doing business in the city of Philadelphia, and as such attorney and solicitor was and had been intrusted with the trust funds of said corporation, and of other persons, for the purpose of making investments of the same, and, as your orator is informed and believes, said Thompson was known by the defendants to be so employed and engaged, and intrusted with the custody, investment and disbursement of trust funds in the regular course of his business as a conveyancer, attorney and solicitor aforesaid; and that your orator, while said Thompson was actively engaged in the said business and profession, on or about the fifteenth day of May, A. D. 1890, retained and employed the said Henry C. Thompson to examine the title to a lot of ground and house, No. 643 North Fifteenth street, in the city and county of Philadelphia, which had recently been purchased by your orator at public sale, and on account of which purchase he had already paid the auctioneers two hundred dollars earnest money, and prepare for him a deed of conveyance of said premises from the vendors to him in fee-simple, and to attend to making settlement with the vendors and to paying them the balance of the purchase-money, to wit, twelve thousand dollars for the said property.

And your orator further shows your honors that the said Thompson, fraudulently and wrongfully contriving and intending to cheat and defraud your orator of the money which belonged to your orator as his property and to transfer the same to the defendants, did on or about the nineteenth day of June, A. D. 1890, request your orator to deposit with him the said sum of twelve thou-
3 sand dollars, and wrongfully and fraudulently represent to your orator that he was about to use the money in making the settlement with the vendors of the said house and lot of ground, and in payment of the balance of the purchase-money which should be found due on such settlement, without your orator being required to give the matter his personal attention. Thereupon your orator, relying upon this promise and undertaking, and reposing implicit trust and confidence in the skill and integrity of the said Thompson, then and there gave the said Thompson his check on the Fidelity Insurance Trust and Safe Deposit Company for twelve thousand dollars, dated the nineteenth day of June, A. D. 1890, payable to the order of said Thompson as attorney, a copy of which

is hereto annexed, marked "A," together with the receipt of James A. Freeman & Company, auctioneers, for the two hundred dollars earnest money, and the said Thompson thereupon gave your orator his receipt in the words following, that is to say:

"PHILADELPHIA, *June 19th*, 1890.

"Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt of $200 to be applied to purchase of house No. 643 North Fifteenth street.

"$12,000. H. C. THOMPSON."

And your orator further shows that said Thompson forthwith endorsed the above-mentioned check for twelve thousand dollars with his name as attorney, and deposited the same for collection in his individual deposit account with the Union Trust Company of Philadelphia, a corporation of the Commonwealth of Pennsylvania. And the said Union Trust Company on the same day collected and received thereon the said sum of twelve thousand dollars of and from the Fidelity Insurance Trust and Safe Deposit Company, and placed the same to the credit of the said Thompson's account with the said Union Trust Company.

And your orator further shows that the said Thompson, in violation of the trust and confidence so reposed in him by your orator, did on the nineteenth day of June, 1890, after receiving your orator's said check for twelve thousand dollars, and depositing the same, immediately draw his own check upon the said Union Trust Company and make said check payable to the order of the said defendants, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, for the sum of fifteen thousand five hundred and seventy-seven dollars and fifty-four cents ($15,577.54), and delivered the said last-mentioned check to the assistant treasurer of said society, the said E. Walter Roberts, on account of the defendants.

4

That your orator is informed and believes that at the time the said Thompson drew his check for fifteen thousand five hundred and seventy-seven dollars and fifty-four cents ($15,577.54) and from that time until the twenty-second day of June, 1890, before which said last-mentioned date said check was paid, there was not, and he well knew there was not, over four thousand dollars ($4,000) standing to his credit on deposit with the said Union Trust Company, in addition to your orator's money, with which the said Union Trust Company could pay said last-mentioned check, and that said check, if paid, would be paid out of the moneys that he had just received from your orator, and deposited with said Union Trust Company; and that said last-mentioned check was, on or about the twenty-first day of June, A. D. 1890, presented to and paid by the Union Trust Company with the money of your orator, as above set forth. And your orator further shows that said Thompson wrongfully and fraudulently misappropriated the money and property of your orator, which had been entrusted to the said Thompson by your orator, and that the said Thompson wrongfully and fraudulently

transferred and set over said sum of twelve thousand dollars belonging to your orator, and deposited with said Thompson, as hereinbefore set forth, to the said defendants by giving said defendants his individual check for fifteen thousand five hundred and seventy-seven dollars and fifty-four cents, upon the said Union Trust Company, as hereinbefore stated.

And your orator further shows that the first knowledge that he had of this fraudulent misappropriation of his money was on or about the fifteenth day of July, A. D. 1890, when he called at the banking-house of the said Union Trust Company with his
5 cancelled check for twelve thousand dollars above mentioned, and inquired if the money collected by said Union Trust Company on said check was still on deposit with said company, and was informed that all the money which said Thompson had on deposit, including the amount of the deposit represented by your orator's check, had been drawn out, except about one hundred dollars, and it was two days afterwards that your orator first learned that his money had been paid over to the defendants. Your orator, thereupon, immediately notified the said society, defendants, of said Thompson's fraudulent misappropriation of his money and property, and demanded the return to him by the defendants of the money so fraudulently misappropriated and transferred to the defendants.

And your orator further shows that the said defendants, after holding the matter under consideration for several months, finally, on or about the thirteenth day of November, A. D. 1890, positively refused to return to your orator the said sum of twelve thousand dollars, or any part thereof, so as aforesaid belonging to your orator, which had come into their hands in the manner above stated

And your orator further shows that the said defendants allege and pretend, as your orator is informed and believes, that the said sum of fifteen thousand five hundred and seventy-seven dollars and fifty-four cents was received by them from the said Thompson on account of a legacy or bequest given and made to said defendants in and by the last will and testament of the Rev. James Saul, D. D., deceased, of whose will said Thompson was named and appointed one of the executors.

And your orator further shows, as he is informed and believes, the same to be true, that the said Rev. James Saul, D. D., departed this life on or about the sixteenth day of November, A. D. 1887, and that his will was duly proved and letters testamentary duly granted thereon by the register of wills of the city and county of Philadelphia, and State of Pennsylvania, on the twenty-third day of December, A. D. 1887, to the Rev. Benjamin Watson, D. D., and the said Henry C. Thompson, the executors named in his said will, who there-
6 upon entered upon the duties of their office as executors aforesaid. That under the laws of the Commonwealth of Pennsylvania, the said legacy became due and payable to the said defendants at the end of one year after the death of the testator, that is to say, on or about the sixteenth day of November, A. D. 1888.

And your orator further shows, as he is informed and believes, that at the time said letters testamentary were granted as aforesaid,

the said Henry C. Thompson was and ever since that time has been, insolvent, and your orator was first informed of said Thompson's insolvency on or about the fifteenth day of July, A. D. 1890, when he first learned of the fraudulent misappropriation of his (your orator's) moneys by the said Thompson.

And your orator further shows, as he is informed and believes, that the defendants, for more than a year previous to the time when the said Thompson fraudulently transferred your orator's money to the said defendants, as above stated, had knowledge of, or the means of knowing, the condition of the said Saul's estate, and that there was unreasonable delay on the part of the said executors in making payment to them, the said defendants, of said legacy, and that said Thompson was and had been insolvent for and during all the said period of time.

And your orator further shows that the said defendants had notice at the time of their receipt of said individual check of said Thompson that the said Thompson was not paying and transferring to them any money or property of the estate of the Rev. James Saul, D. D., deceased, and that said Thompson had no money or property of his own sufficient to pay his said individual check to said defendants, and also had sufficient notice to put them, the said defendants, upon inquiry, from which they would have learned that the said Thompson was, by said check, transferring to the said defendants your orator's money; and your orator further shows that the defend ants ought not, under the circumstances, to be permitted to retain your orator's money and property on the pretences set up by them, the said defendants.

And your orator further shows to your honors that the said Thompson has absconded from his last known residence and gone to parts unknown, and cannot now be served with
7 process, and your orator prays that process may issue to bring him in and make him a party to this bill whenever he may come within the jurisdiction of your honorable court.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and make a full disclosure and discovery of all the matters aforesaid, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the matters hereinbefore stated and charged, and to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer: that is to say

1. Whether the defendants did not receive in the month of June, A. D. 1890, from Henry C. Thompson a check in the words and figures following:

"$15,577.54. PHILADELPHIA, *June 19th*, 1890.

"The Union Trust Company, Nos. 715, 717, 719 Chestnut street,

Pay to the order of the Domestic & Foreign Miss. Soc. of the P. E. Church fifteen thousand five hundred & seventy-seven dollars $\frac{54}{100}$

H. C. THOMPSON."

2. Whether defendants did not endorse, or cause to be endorsed, said check for deposit in substantially the following words:

"For deposit in Bank of New York, N. B. A. for account of the Dom. & For. Missionary Soc'y of Protestant Episcopal Church in U. S. A.

"GEORGE BLISS, *Treasurer*,
"Per E. W. ROBERTS, *Ass't Treas.*"

If so, when was the check endorsed and when was it deposited? Whether said Bank of New York National Banking Association did not collect said check so deposited and place the amount
8 thereof to the credit of the defendants.

3. Whether defendants did not receive a letter from the plaintiff's attorney on or about July 17th, 1890, notifying them that the above-mentioned sum of fifteen thousand five hundred and seventy-seven dollars and fifty-four cents so received by the defendants through the said check of Henry C. Thompson was paid to them with moneys belonging to the said plaintiff, James Holly, without his knowledge or consent, and that he claimed to have his money, to wit: twelve thousand dollars, returned to him? If yea, annex a copy of the letter to your answer; and state further what answer or respone was made by you to this letter, and when was the same so made? Did not the plaintiff afterwards make repeated demands upon defendants for the return of his money?

4. Whether the defendants did not afterwards, on or about the thirteenth day of November, A. D. 1890, absolutely refuse to return said moneys to said plaintiff; and cause notice of such refusal to be given to the plaintiff?

5. If yea, state whether the refusal to pay back the money claimed by plaintiff is based upon any claim that the defendants make to said moneys as coming to them in any way from the estate of said Rev. James Saul, D. D., deceased. State whether the said Rev. James Saul, D. D., died on or about the sixteenth day of November, A. D. 1887? Whether or not he left a will in which said Henry C. Thompson, and one Rev. Benjamin Watson, D. D., were named as executors? Was there a legacy or residuary bequest given by said will to the society defendants? If yea, state the amount thereof, and when notice first came to you that such legacy or bequest had been made to the society. Were not letters testamentary granted to the said Thompson and Watson by the register of wills of the county of Philadelphia, in the State of Pennsylvania, on or about the twenty-third day of December, A. D. 1887? State all your knowledge, information and belief in answer to this inter-

rogatory, and from whom such knowledge and information were obtained?

And that the said defendants may answer the premises, and
9 pay back to your orator the sum of twelve thousand dollars, with interest thereon from the nineteenth day of July, A. D. 1890; and that your orator may have such further and other relief in the premises as the nature of his case shall require, and that to your honors shall seem meet.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, to be directed to the said The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and to the said E. Walter Roberts, assistant treasurer, commanding them and every of them, at a certain day and under a certain pain therein to be specified personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors shall seem meet.

And your orator will ever pray.

CEPHAS BRAINERD,
Solicitor for Complainant, 111 *Broadway, N. Y. City.*

CEPHAS BRAINERD, JR.,
Of Counsel for Complainant, 111 *Broadway, N. Y. City.*

10 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, County of Philadelphia, } *ss:*

James Holly, being duly sworn, deposeth and saith: That he is the complainant in the foregoing bill named, and has read the same, and knows the contents thereof.

That the said bill is true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those he believes it to be true.

JAMES HOLLY.

Sworn to before me, this fourteenth day of January, A. D. 1891.

FRANK A. HARTRANFT,
[SEAL.] *Notary Public.*

NOTE.—The said defendants are each required separately to answer the interrogatories in the foregoing bill of complaint numbered respectively, 1, 2, 3, 4 and 5.

CEPHAS BRAINERD,
Solicitor for Complainant, 111 *Broadway, N. Y. City.*

11 Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY of the Protestant Episcopal Church in the United States of America and E. Walter Roberts. } In Equity.

"A."

Copy of Check Referred to in the Annexed and Foregoing Bill of Complaint of James Holly.

No. —. PHILADELPHIA, *June* 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co.

Pay to Henry C. Thompson, att'y, or order, twelve thousand dollars.

$12,000.

(Signed) JAS. HOLLY.

Copy of Stamp on Face.

The Fidelity Insurance, Trust
Paid,
Jun 19 1890
and Safe Deposit Co.

Copy of Endorsements.

For deposit. H. C. Thompson, att'y. For collection, The Union Trust Company, Philadelphia, M. S. Stokes, treasurer.

12 *Defendants' Answer.*

In the Circuit Court of the United States for the Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY of the Protestant Episcopal Church in the United States of America and E. Walter Roberts. } In Equity.

The joint and several answer of The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts, the above-named defendants, to the bill of complaint of the above-named complainants.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise or that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto or to so much thereof as these defend-

ants are advised it is material or necessary for them to make answer to jointly and severally answering say:

I. We admit that the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America is a corporation duly incorporated by chapter — of the laws of 1846 of the State of New York, and the acts amendatory thereof and supplementary thereto and organized under and pursuant to the laws of the State of New York, having its principal place
13 of business in the city of New York, and that E. Walter Roberts is a resident of the city of Brooklyn, a citizen of the State of New York and assistant treasurer of the said Domestic and Foreign Missionary Society.

II. We do not know whether or not on or about the fifteenth day of May, 1890, one Henry C. Thompson, named in the bill of complaint herein, was an inhabitant of the State of New Jersey. We have been informed and believe that said Thompson was at that time and for some years previous thereto, had been practicing as an attorney and counsellor-at-law in the courts of the Commonwealth of Pennsylvania, but we do not know and cannot set forth as to our belief or otherwise whether or not the said Thompson was, at the time above mentioned, or any of them, a conveyancer giving special attention to examining titles and the preparing of deeds and title papers and making settlements of purchase-moneys entrusted to him for the purpose by and on behalf of purchasers of real estate, or whether he was at that time or had been for a number of years prior thereto the solicitor of the Real Estate Title Insurance and Trust Company, a corporation of the State of Pennsylvania doing business in the city of Philadelphia, but we admit that shortly after the death of the Rev. James Saul hereinafter referred to we had reason to believe that said Thompson was the solicitor of said company although we were then and now are ignorant of what were his duties as such, but we do not know and cannot set forth as to our belief or otherwise whether as such attorney and solicitor he was or had been entrusted with the trust funds of said corporation, or of other persons, for the purpose of making investments of the same. We deny that it was known by us or either of us that said Thompson was so employed or engaged, or entrusted with the custody, investment or disbursement of trust funds in the regular course of his business as a conveyancer, attorney and solicitor aforesaid.

III. We do not know, and cannot set forth as to our belief or otherwise, whether while said Thompson was actively en-
14 gaged in the said business and profession, on or about the fifteenth day of May, A. D. 1890, the complainant herein retained and employed the said Thompson to examine the title to a lot of ground and house, No. 643 North Fifteenth street, in the city and county of Philadelphia, or whether the complainant herein had recently purchased said house at public sale, or whether on account of said purchase he had paid the auctioneers two hundred dollars earnest money, or whether the complainant herein employed said Thompson to prepare for him a deed of conveyance of said premises from the vendors to him, in fee-simple to attend to making set-

tlement with any vendors of any property and to paying them the balance of the purchase-money, to wit, twelve thousand dollars, for any such property.

IV. We do not know and cannot set forth as to our belief or otherwise, whether said Thompson, fraudulently and wrongfully contriving and intending to cheat and defraud the complainant herein of money which belonged to the complainant as his property and to transfer the same to the defendants above named, did on or about the nineteenth day of June, A. D. 1890, request the complainant to deposit with him the sum of twelve thousand dollars, and wrongfully and fraudulently represent to the complainant that he was about to use the money in making the settlement with the vendors of the house and lot of ground above mentioned, and in payment of the balance of the purchase-money which should be found due on such settlement, without the complainant being required to give the matter his personal attention; or whether the complainant, relying upon this alleged promise and undertaking, and reposing implicit trust and confidence in the skill and integrity of said Thompson, then and there gave the said Thompson his check on the Fidelity Insurance Trust and Safe Deposit Company for twelve thousand dollars, dated the nineteenth day of June, A. D. 1890, payable to the order of said Thompson as attorney, together with the receipt of James A. Freeman & Co., auctioneers, referred to in the bill of complaint herein, or whether the said Thompson thereupon gave this complainant the receipt therefor as alleged in said bill, although we admit that on or about the nineteenth day of June, 1890, the said Henry C. Thompson received a check of which the following is a copy:

15 "No. —. PHILADELPHIA, *June* 19, 1890.

"The Fidelity Insurance, Trust & Safe Deposit Co.

"Pay to Henry C. Thompson, att'y, or order twelve thousand dollars.

"$12,000.

"(Signed) JAMES HOLLY."

Stamped on the face with the following words:

"The Fidelity Insurance, Trust and Safe Deposit Co. (Paid June 19, 1890.)"

Endorsed on the back as follows:

"For deposit H. C. Thompson, att'y. For collection the Union Trust Company, Philadelphia, M. S. Stokes, treasurer," but for greater certainty we crave leave to refer to said check when produced, but defendants had no knowledge of the receipt and endorsement of said check until long after the receipt and endorsement thereof, and until long after the receipt by defendants and expenditure of the $15,577.54 hereinafter referred to.

V. We do not know and cannot set forth as to our belief or otherwise whether said Thompson thereupon endorsed the said check for twelve thousand dollars, above referred to, with his name as attorney

except as above stated. We admit that he deposited said check fo collection in his individual deposit account with the Union Trus Company of Philadelphia, but allege that we had no knowledg thereof until long after said deposit and long after the receipt b defendants and expenditure of the $15,577.54 hereinafter referre to, and we do not know and cannot set forth as to our belief o otherwise whether said Union Trust Company on the same da collected and received thereon the said sum of twelve thousan dollars of and from the Fidelity Insurance Trust and Safe Depos Company, or whether said company placed the same to the credi of the said Thompson's account with the said Union Trust Com pany.

VI. We admit that on or about the nineteenth day of June, 189 said Thompson did draw his own check upon the said Union Trus Company, and make said check payable to the order of th
16 said defendant, The Domestic and Foreign Missionary Societ of the Protestant Episcopal Church in the United States o America, for the sum of $15,577.54, and did deliver the said las mentioned check to the defendant, E. Walter Roberts, on accou of the defendant, The Domestic and Foreign Missionary Society, bu we do not know and cannot set forth as to our belief or otherwis whether said Thompson so drew the last-mentioned check an transferred the same to the said society in violation of any trust o confidence reposed in him by the complainant herein, or whethe said check was so drawn and transferred immediately after th alleged receipt by Thompson of the complainant's alleged check fo $12,000, and immediately after his alleged deposit of the same t his account.

VII. We do not know and cannot set forth as to our belief o otherwise, whether at the time said Thompson drew his check fo $15,577.54, and from that time until the twenty-second day of Jun there was not, or whether he well knew there was not over $4,00 standing to his credit on deposit with the said Union Trust Com pany, in addition to the money alleged to belong to the complainan herein, with which the said Union Trust Company could pay sai last-mentioned check, or whether he knew that said last-mentione check, if paid, would be paid out of the moneys that he is allege to have received from complainant herein, and deposited with sai Union Trust Company.

We admit that said last-mentioned check was on or about th twenty-first day of June, A. D. 1890, presented to the said Unio Trust Company, and paid by the said company. We deny that sai last-mentioned check was paid with the money of the complainan herein.

VIII. We do not know and cannot set forth as to our belief o otherwise, whether said Thompson wrongfully and fraudulentl misappropriated any money or property of the complainant herei which had been entrusted to the said Thompson by said complai ant, but we deny that said Thompson wrongfully and fraudulentl transferred and set over said sum of twelve thousand dollars belon ing to the complainant, and deposited with said Thompson, to th

defendants by giving us, the said defendants, his individual
17 check for fifteen thousand five hundred and seventy-seven dollars and fifty-four cents, upon the Union Trust Company.

IX. We do not know and cannot set forth as to our belief or otherwise, whether or not the first knowledge the complainant herein had of this alleged fraudulent misappropriation of his money was on or about the fifteenth day of July, A. D. 1890, or whether he on that day called at the banking-house of the said Union Trust Company with his cancelled check for twelve thousand dollars, or whether or not he inquired whether the money alleged to have been collected by said Union Trust Company on said check was still on deposit with said company, or whether or not he was informed that all the money which said Thompson had on deposit, including the amount of the alleged deposit represented by the complainant's check, had been drawn out, except about one hundred dollars, or whether or not it was two days afterwards that the complainant first learned that his money had been paid over to the defendants. We admit that the complainant, on or about the seventeenth day of July, 1890, notified the defendant society of his claim that said Thompson had fraudulently misappropriated his money and property, and demanded the sum of twelve thousand dollars alleged by him to have been misappropriated by said Thompson, and admit the receipt by defendants of a letter from one Arthur M. Burton, hereinafter referred to, and dated July 17, 1890, but deny any notification and demand save as herein admitted.

We deny that after holding the matter under consideration for several months, we finally, on or about the thirteenth day of November, 1890, positively refused to return to the complainant the said sum of twelve thousand dollars or any part thereof, so, as alleged, belonging to the complainant, and we deny that said sum had, as alleged, come into our hands as stated in the bill of complaint herein, although we admit that prior to the commencement of this suit we refused to pay the complainant the sum of twelve thousand dollars claimed by him.

X. We admit that the said sum of $15,577.54 was received by us from the said Thompson, but only in the manner and under
18 the circumstances hereinafter set forth, and we admit that said Saul died, and that his will was duly proved, and letters testamentary duly granted thereon to said Thompson and to the Rev. Benjamin Watson, D. D., the executors named in his said will, in the manner set forth in the bill of complaint herein.

We do not know and cannot set forth as to our belief or otherwise whether or not under the laws of the Commonwealth of Pennsylvania said legacy became due and payable to us at the end of one year after the death of the testator, that is to say, on or about the sixteenth day of November, A. D. 1888.

We do not know and cannot set forth as to our belief or otherwise, whether or not at the time said letters testamentary were granted, the said Henry C. Thompson was, or whether or not said Thompson ever since that time has been insolvent, or whether or not the complainant was first informed of said Thompson's insolvency on

or about the fifteenth day of July, A. D. 1890, when, as alleged, he first learned of the alleged fraudulent misappropriation of his money by said Thompson.

XI. We deny the allegation in the bill of complaint herein that we, or either of us, for more than a year previous to the time when said Thompson as alleged fraudulently transferred the complainant's money to us, had knowledge of or the means of knowing the condition of said Saul's estate; that there was unreasonable delay on the part of the said executors in making payment to us of said legacy, and that said Thompson was and had been insolvent for and during all the said period of time.

XII. We deny that we had notice at the time of the receipt by us of said individual check of said Thompson, that he, the said Thompson, was not paying and transferring to us money or property of the estate of the Rev. James Saul, D. D., deceased, or that we had notice that the said Thompson had no money or property of his own sufficient to pay his said individual check to us, or that we had sufficient or any notice to put us upon inquiry from which we would have learned that said Thompson was by said check transferring to us any money belonging to the complainant herein, and we allege that we were legally, equitably and justly entitled to retain the money paid to us upon the presentation of the said check, and we deny that we retain any money or property of the complainant.

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We do not know and cannot set forth as to our belief or otherwise whether or not the said Thompson has absconded from his last known residence and gone to parts unknown, although we have recently been informed that he has, or whether or not he cannot now be served with process.

XIII. And the defendants, further answering, allege that after the payment to the said society by said Thompson of the $15,577.54, hereinbefore referred to and its expenditure as hereinafter set forth, the defendants were informed that said Thompson had at some time prior to the said twentieth day of June, 1890, taken the securities and property of the said Rev. James Saul, which had come into his hands as executor, and had used the same in some manner to these defendants unknown; but these defendants are at present ignorant of the exact use to which said securities and property were applied by said Thompson and whether or not said securities and property were used and applied by said Thompson according to the provisions of the last will and testament of the said Rev. James Saul or not, and defendants do not now know and cannot set forth what part of said $15,577.54 was part of the property received by said Thompson as executor aforesaid and as the property of the said Rev. James Saul.

And defendants further answering allege that in response to a request from defendants that the executors of said Saul pay the defendant society the legacy left to it by the said Rev. James Saul and in this answer referred to, the defendant society received from said Thompson the $15,577.54, hereinabove referred to, and these defend-

ants further allege that said defendant society was a purchaser for a valuable consideration, without notice of the said $15,577.54.

And these defendants further answering allege that at the time of the notification hereinbefore referred to and the receipt by the defendant society of the letter hereinafter referred to from one Arthur M. Burton, these defendants had expended, in the usual course of their business and according to the will of the said Rev. James Saul, the said sum of $15,577.54.

20 And we deny that at the time the check above named was given to us, or either of us, or the money thereon paid to us, or either of us, or at time prior thereto or to the expenditure of said $15,577.54, we or either of us, were informed that said Thompson did not draw said check upon his own funds or upon the property of the estate of said Saul, deceased, or that we had any knowledge or information of any facts which should have led us to suppose that said Thompson was drawing said check upon any moneys other than the moneys aforesaid.

Answering the interrogatories contained in the bill of complaint herein, we say:

I. We admit that we did receive, in the month of June, 1890, from Henry C. Thompson, a check, a copy of which is set forth at folio 23 of the bill of complaint herein, but we crave leave for greater certainty to refer to the same when produced.

II. We admit that we did endorse said check for deposit in substantially the form set forth at folio 24 of the bill of complaint herein.

That said check was endorsed on the twentieth day of June, 1890, and deposited on the said twentieth day of June, 1890.

We admit that the Bank of New York National Banking Association did collect said check and place the amount thereof to the credit of the defendants.

III. In answer to the third interrogatory, we allege that we received a letter from one Arthur M. Burton, a copy of which is as follows:

"Office of Arthur M. Burton, attorney-at-law, No. 504 Walnut street.

"PHILADELPHIA, *July 17th*, 1890.

"George Bliss, Esq., treasurer of the Domestic and Foreign Missionary Society of the Prot. Ep. Church in the U. S. of America.

"DEAR SIR: I regret to be under the necessity of notifying you and your society that the payment made by Henry C.

21 Thompson, Esq., of this city, to you on or about the twenty-first day of June, 1890, of fifteen thousand five hundred and seventy-seven $\frac{54}{100}$ dollars by his check for that amount to the order of the society was made with moneys deposited with said Henry C. Thompson by Mr. James Holly, of 1221 Walnut street, in this city, on June 19th, 1890, two days preceding. The amount of Mr.

Holly's deposit was twelve thousand dollars and the same was appropriated by Mr. Thompson without Mr. Holly's knowledge or consent, and he will therefore claim to have a return of his moneys so paid by said Thompson to your society. I send you a copy of the affidavit made by Mr. Holly, on which an attachment has been issued in this city to secure what remaining funds Thompson now has on deposit here to answer this claim.

"Yours respectfully, ARTHUR M. BURTON,
"Att'y for James Holly."

and we deny that we received any other letter on or about July 17, 1890, from any attorney purporting to represent the complainant. We made no written reply to said letter.

We admit that the plaintiff thereafter did make repeated demands for the payment by these defendants to said complainant of twelve thousand dollars of the said $15,577.54, received, as stated above, from said Thompson.

IV. In reply to the fourth interrogatory, we refer to paragraph 9 of the answer.

V. In reply to the fifth interrogatory, we refer to the facts relevant to said interrogatory, and stated in that part of our defense contained in paragraph 13 above, and we admit that said Saul died on or about the sixteenth day of November, 1887; and

Said Saul left a will, in which said Thompson and one Rev. Benjamin Watson, D. D., were named as executors;

There was a legacy or residuary bequest given by said will and codicils to the defendant, The Domestic and Foreign Missionary Society, and said legacy included all of the estate of which said Saul died possessed, and said legacy amounted to more than the said sum of $15,577,54.

22 That notice first came to us that such legacy had been made to this society within a month or six weeks after said death.

We are ignorant whether letters testamentary were duly granted to said Thompson and Watson in the State of Pennsylvania on or about the twenty-third day of December, 1887. The knowledge of these defendants in regard to this interrogatory is derived from the said will and from notices in the newspaper of said death, and from statements made to these defendants by their solicitors. We believe that letters were granted, but are ignorant of the date thereof.

And these defendants respectively deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged without this that there is no other matter, cause or thing in the said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of these defendants, all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and

humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA,

[SEAL.] By JOSHUA KIMBER, *Associate Secretary*,
E. WALTER ROBERTS.

DAVIES, SHORT & TOWNSEND,
Solicitors for Defendants, 32 *Nassau Street, N. Y.*

23 STATE OF NEW YORK,
City and County of New York, } *ss:*
Southern District of New York,

E. Walter Roberts, being duly sworn, deposes and says: I am one of the defendants above named. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of the defendant corporation I believe to be true.

E. WALTER ROBERTS.

Sworn to before me this twenty-ninth day of April, 1891.
WILLIAM W. FULLER,
Comm'r of Deeds N. Y. City & Co.

24 Circuit Court of U. S., Southern District of New York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE P. E. Church, U. S. A., and E. Walter Roberts.

Exceptions Taken by Plaintiff to the Answer of Defendant to said Plaintiff's Bill of Complaint for Insufficiency.

1. For that the said defendants have not to the best and utmost of their knowledge, remembrance, information and belief, answered and set forth in response to the charges in the plaintiff's bill, wherein the said plaintiff alleges that he had demanded of the defendants the return of the money which had been fraudulently misappropriated and transferred by Henry C. Thompson, his attorney, to said defendants, and that said defendants had refused to return said moneys to said plaintiff, as to which the said defendants in their answer have admitted that they did so refuse to return the said moneys prior to the commencement of this suit, whether, as further charged in said bill in substance that the said defendant society (who have admitted in their answer that, as sole legatees under the will of said Rev. James Saul, deceased, they had notice of a legacy coming to them from his estate within six weeks from the date of his death) for more than a year previous to the time

when said Thompson fraudulently transferred plaintiff's money to them, had knowledge of, or the means of knowing, the condition of the estate of the said Rev. James Saul, deceased, and that there was unreasonable delay on the part of the executors of said
25 estate in making payment to them of said legacy, and of the insolvency of said Thompson, during all that period of time, and that the money which they the said defendants received from said Thompson by his individual check for $15,577.54, was not the money or property of said Thompson, nor the money or property of the estate of said Rev. James Saul, deceased (see folios 16 to 21) and the fifth interrogatory (folio 26), which is in the following words:

"5. If yea, state whether the refusal to pay back the money claimed by plaintiff is based upon any claim that the defendants make to said moneys as coming to them in any way from the estate of the said Rev. James Saul, D. D., deceased. State whether the said Rev. James Saul, D. D., died on or about the sixteenth day of November, A. D. 1887. Whether or not he left a will, in which said Henry C. Thompson and one Rev. Benjamin Watson, D. D., were named as executors? Was there a legacy or residuary bequest given by said will to the society defendants? If yea, state the amount thereof, and when notice first came to you that such legacy or bequest had been made to the society. Were not letters testamentary granted to the said Thompson and Watson by the register of wills of the county of Philadelphia, in the State of Pennsylvania, on or about the twenty-third day of December, A. D. 1887? State all your knowledge, information and belief in answer to this interrogatory, and from whom such knowledge and information were obtained."

As to which allegations and charges in the said plaintiff's bill the said defendants (after denying the same in their answer (articles XI and XII)), have further answered as follows:

Article XIII of Defendants' Answer.

XIII. "And the defendants, further answering, allege that after the payment to the said society by said Thompson of the $15,577.54, hereinbefore referred to, and its expenditure as hereinafter set forth, the defendants were informed that said Thompson had at some time prior to the said twentieth day of June, 1890, taken the securities and property of the said Rev. James Saul, which had come into his hands as executor, and had used the same in some man-
26 ner to these defendants unknown, but these defendants are at present ignorant of the exact use to which said securities and properties were applied by said Thompson, and whether or not said securities and property were used and applied by said Thompson according to the provisions of the last will and testament of the said Rev. James Saul or not, and defendants do not now know, and cannot set forth what part of said $15,577.54, was part of the property of the said Rev. James Saul.

"And defendants further answering, allege that in response to a

request from defendants that the executors of said Saul pay the defendant society the legacy left to it by the said Rev. James Saul, and in this answer referred to, the defendant society received from said Thompson $15,577.54 hereinabove referred to; and these defendants further allege that said defendant society was a purchaser for a valuable consideration without notice of the said $15,577.54.

"And these defendants further answering, allege that at the time of the notification hereinabove referred to, and the receipt by the defendant society of the letter hereinafter referred to from one Arthur M. Burton, these defendants had expended in the usual course of their business, and according to the will of the said Rev. James Saul, the said sum of $15,577.54.

"And we deny that at the time the check above named was given to us or either of us, or the money thereon paid to us, or either of us, or at any time prior thereto, or to the expenditure of said $15,577.54, we or either of us were informed that said Thompson did not draw said check upon his own funds or upon the property of the estate of said Saul, deceased, or that we had any knowledge or information of any facts which would have led us to suppose that said Thompson was drawing said check upon any moneys other than the moneys aforesaid."

And to the fifth interrogatory the said defendants further set forth in their said answer as follows:

Defendants' Answer to Fifth Interrogatory.

"V. In reply to the fifth interrogatory, we refer to the facts relevant to said interrogatory, and stated in that part of our defence contained in paragraph XIII above, and we admit that said Saul died on or about the sixteenth day of November, 1887; and said Saul left a will, in which said Thompson and one Rev. Benjamin Watson, D. D., were named as executors."

27 "There was a legacy or residuary bequest given by said will and codicils to the defendant, The Domestic and Foreign Missionary Society, and said legacy included all the estate of which said Saul died possessed, and said legacy amounted to more than the sum of $15,577.54.

"That notice first came to us that such legacy had been made to this society within a month or six weeks after the said death.

"We are ignorant whether letters testamentary were duly granted to said Thompson and Watson in the State of Pennsylvania on or about the twenty-third day of December, 1887. The knowledge of these defendants in regard to this interrogatory is derived from the said will and from notices in the newspaper of said death, and from statements made to these defendants by their solicitors. We believe that letters were granted, but are ignorant of the date thereof."

Which said answer is insufficient and evasive in the following respects:

1. In not stating whether the refusal of the defendant society to

pay back the said moneys is based upon any claim to said moneys as coming from the estate of the Rev. James Saul, deceased.

2. In not setting forth defendants' belief as to what funds said Thompson drew his said check of $15,577.54 upon or who was the owner of said funds.

3. In not setting forth and answering whether said "request from defendants that the executors of said Saul pay the defendant society the legacy left to it by the Rev. James Saul" was a verbal request or in writing, nor by whom said request was made and to whom it was addressed and under what circumstances the same was made, and how and upon what information received by them, and under what circumstances defendants or either of them were led to make such request, and whether there was more than one request, and, if so, how often and at what times said requests were repeated.

4. In that the said "defendants further allege that said defendant society was a purchaser for a valuable consideration without
28 notice of the said $15,557.54" without setting forth particularly the consideration paid, to whom paid, when paid, their title thereto, and any fact or facts or circumstances upon which said defendant society claims to be a purchaser for value without notice.

5. In not stating how the defendants have expended the $15,577.54, what the items of expenditure were and the respective dates of such items of expenditure, and how and in what respect the said moneys were expended according to the will of the Rev. James Saul, deceased, and what was the usual course of business of defendant society in making said expenditure of said moneys, whether the same was expended by standing order or special resolution of the board of managers of the society defendant or otherwise.

6. In not setting forth in their answer whether they have stated all their knowledge, information and belief in answer to the said fifth interrogatory, and in not stating what knowledge these defendants derived from the said will, what knowledge was derived from notice in the newspapers of the said death of Rev. James Saul, and what knowledge said defendants derived from statements made to them by their solicitors, and the time or times when the said knowledge derived from their solicitors was obtained.

7. In not setting forth in their answer more fully what was the amount of the legacy or residuary bequest given by the will of the said Rev. James Saul, deceased, to the said society defendant. What information they received respecting the same from their solicitors concerning the condition and the amount of said estate and the assets belonging thereto and the settlement of the same, and the time when the legacy to said defendants would become payable, and also what steps were taken or inquiries made by said defendants with a view of ascertaining when said legacy would be payable to them according to the terms of the will.

8. In not setting forth in article XI of said defendants' answer, their information and belief as to the condition of said Saul's
29 estate during the year previous to the time when the said Thompson fraudulently transferred complainant's money to them, and in not setting forth their information and belief whether

there was unreasonable delay on the part of the said executors in making payment to the defendant society of said legacy, or as to said Thompson's solvency or insolvency at any time during said period.

In all of which particulars the said plaintiff is advised that the said answer of the defendants is evasive, imperfect and insufficient, and humbly prays that the said defendants may be compelled to put in full and sufficient answers thereto.

New York, 12th June, 1891.

CEPHAS BRAINERD,
Solicitor for Plaintiff, 47 *Cedar Street, N. Y. City.*

CEPHAS BRAINERD, JR.,
Of Counsel for Complainant, 47 *Cedar Street, N. Y. City.*

30 *Defendants' Further Supplemental Answer.*

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE Protestant Episcopal Church in the United States of America and E. Walter Roberts.

The further joint and several answers of The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and E. Walter Roberts, the above-named defendants, to the bill of complaint of the above-named orator respectfully shows by way of further answer and amendment to the answer on file herein.

First. These defendants further answering allege that the refusal of the defendant society to pay the plaintiff the moneys demanded is based upon the claim to said moneys as coming from the estate of the Rev. James Saul, deceased, in the manner in the answer and in this further answer set forth, and also upon the claim that the said society is entitled to retain the said moneys as a *bona fide* purchaser or transferee thereof for a good and valuable consideration without notice of any of the facts in the said bill of complaint alleged upon which the said orator claims a recovery against said defendant.

Second. We believe that the said Thompson drew his said check for $15,577.54 against an account in which he had prior
31 thereto deposited $12,000 which had been received by him from the complainant, and that said Thompson was the owner of the funds upon which he drew his said check of $15,577.54.

Third. These defendants further answering allege that on or about the seventeenth day of November, 1887, these defendants saw in the public newspapers a notice of the death of the said Rev. Dr. Saul on the sixteenth day of November, 1887. On or about the twenty-eighth day of December, 1887, these defendants received from Henry C. Thompson a letter, a copy of which is annexed hereto,

and marked "Exhibit A." On or about the twenty-ninth day of December, 1887, these defendants mailed said Thompson a letter, a copy of which is annexed hereto, and marked "Exhibit B." On or about the twenty-sixth day of July, 1888, these defendants mailed the said Thompson a letter, a copy of which is annexed hereto, and marked "Exhibit C." These defendants further allege that on or about the seventeenth day of September, 1888, these defendants mailed to the Philadelphia Safe Deposit and Insurance Company, and to said Henry C. Thompson and the Rev. Benjamin Watson a letter, a copy of which is annexed hereto and marked "Exhibit D." And these defendants further allege that they were, on or about said date, informed and believed that the conveyance requested in said Exhibit D was promptly made by said Thompson. These defendants, further allege that, subsequent to the twenty-sixth day of July, 1888, and prior to the twentieth day of February, 1890, no communication was made by these defendants to the said executors in reference to said estate. That on or about the said twentieth day of February these defendants mailed to the said Henry C. Thompson a letter, a copy of which is annexed hereto and marked "Exhibit E." These defendants further allege that on or about the fifteenth day of April, 1890, these defendants received from the said Benjamin Watson a letter, a copy of which is annexed hereto and marked "Exhibit F." These defendants further allege that on or about the seventeenth day of April, 1890, they mailed to the said Henry C. Thompson a letter, a copy of which is annexed hereto and marked "Exhibit G." These defendants further allege that they have received a large number of legacies for a number of years past; that they have repeatedly had occasion to request the
32 payment of legacies a number of times from executors before finally receiving the same, and that the requests made as herein set forth to said Thompson were not unusual in number; that the experience of these defendants has been that executors are dilatory in the payment of legacies, and in the usual course of these defendants' business legacies are not received promptly. These defendants further allege that on or about said seventeenth day of April, 1890, they mailed to the Rev. Benjamin Watson a letter, a copy of which is annexed hereto and marked "Exhibit H;" and that on or about the twenty-fifth day of April, 1890, these defendants received a postal card from the said Rev. Benjamin Watson, a copy of which is annexed hereto, and marked "Exhibit I." These defendants further allege that on or about the twenty-ninth day of April, 1890, these defendants received a letter from the said Rev. Benjamin Watson, a copy of which is annexed hereto and marked "Exhibit J." That on or about the first day of May, 1890, these defendants wrote said Dr. Watson that no word had been received from said Thompson, of this letter defendants have no copy. On or about the twenty-fourth day of May, 1890, these defendants wrote the said Dr. Watson a letter, a copy of which is annexed hereto and marked "Exhibit K." These defendants further allege that on or about the twenty eighth day of May, 1890, these defendants wrote the Rev. Dr. Watson a letter, a copy of which is annexed hereto and

marked "Exhibit L." These defendants further allege that on or about the thirtieth day of May, 1890, these defendants received from the said Benjamin Watson two letters, copies of which are annexed hereto and marked "Exhibits M and N." These defendants further allege that on or about the nineteenth day of June, 1890, the said Henry C. Thompson came to the office of these defendants, in the city of New York, and gave these defendants a check for the sum of $15,577.54, and presented to these defendants a memorandum, a copy of which is annexed hereto and marked "Exhibit O," and asked from these defendants a receipt, which receipt was given to said Henry C. Thompson, and the said Thompson then stated to these defendants that the balance due would be paid shortly. That these defendants had no other or further conversation with the said Henry C. Thompson.

33 These defendants further allege that no further requests were made for said legacy, except as such requests may have been contained in the letter hereinbefore set forth, and that said requests were not made upon any information received by these defendants except as hereinabove set forth, and that these defendants were not led to make such requests, except under the circumstances hereinbefore set forth.

Fourth. These defendants further allege that the facts and circumstances under which these defendants received said sum of $15,577.54 as set forth in the answer herein and this further answer, constitute the defendant society a *bona fide* purchaser for value without notice and that the said defendant claims to be such *bona fide* purchaser for value without notice upon said facts and circumstances and not otherwise.

Fifth. These defendants allege that the copy of the last will and testament of the said Rev. James Saul, received by these defendants from said Thompson annexed to said Exhibit A, is a copy of said will. These defendants, further answering, allege that the moneys received as aforesaid from Henry C. Thompson, executor, were expended by the defendant society for domestic missions, foreign missions, and for the benefit of colored people in the Southern, or formerly slave, States, for the support of schools and missions through its officers, acting partly under the general direction of the board of managers and partly under a resolution of said board passed on the tenth day of June, 1890, authorizing the treasurer to apply such legacies as might be received before September 1, 1890, to the payment of appropriations to September 1, 1890, of which resolution a copy is hereto annexed and marked "P."

Sixth. These defendants, further answering, refer to said will, annexed hereto, for the knowledge which they derive from said will; and these defendants further allege that the only knowledge they derived from notices in the newspapers of the death of the said Rev. James Saul was the fact of his said death, as hereinbefore set forth. These defendants further allege that the said Rev. James Saul was, for a number of years prior to his death, a member of the

board of managers of the defendant society, and was in the
34 habit of giving money to said society in his lifetime, and gave special instructions to this society how any moneys in their hands at his death, and which had been received from him, should be expended, and at all times exhibited extreme care in the management of the affairs of this society so far as he took part therein, and extreme carefulness in the method of giving to this society in his lifetime, and a number of years ago said Rev. James Saul placed a sealed copy of his will in the hands of the defendant society, stating verbally that he had made said society his residuary legatee. The defendant society is incorporated under the laws of the State of New York, by an act passed May 13, 1846, as amended by an act passed April 12, 1867, and an act passed May 8, 1880, and is a purely religious, charitable, and benevolent society, engaged in missionary operations throughout the world, and has no funds or property except such as it may receive in trust for such missionary purposes. These defendants further allege that the knowledge derived from their said solicitor was the information in article 13, of said defendants' answer, namely—that said Thompson had, at some time prior to said twentieth day of June, taken the securities and property of the said Rev. James Saul, which had come into his hands as executor, and had used the same in some manner to these defendants unknown, as in said answer alleged. These defendants believe the value of the legacy to these defendants from the said Rev. James Saul, deceased, was about the sum of $21,000. These defendants allege that prior to the receipt of said moneys from said Henry C. Thompson, they received no information from their solicitors concerning the condition and the amount of said estate, and the assets belonging thereto, and the settlement of the same, and the time when the legacy to said defendants would became payable; and these defendants further allege that no steps were taken or inquiries made by said defendants with a view to ascertaining when said legacy would be payable to them according to the terms of the said will, except as is contained in the correspondence hereinbefore set forth.

Seventh. These defendants had no information or belief as
35 to the condition of said Saul's estate during the year previous to the time when the said Thompson paid these defendants the said sum of $15,577.54 other than as hereinbefore set forth, and, as plaintiffs were informed by the correspondence above set forth, and except that these defendants at all times prior to the seventeenth day of July, 1890, believed that the estate of said Saul had not been in any way disposed of by said Thompson contrary to his duties as said executor, and these defendants deny that said Thompson fraudulently transferred plaintiff's money to them. These defendants further answering, allege that prior to the payment of said legacy to them, these defendants had no knowledge or information sufficient to enable them to form a belief as to whether the delay in the payment of said legacy was unreasonable or not; and these defendants had, during the said year, no information in regard to the solvency or insolvency of said Thompson at any time

during said period, and at all times during said period had no information and no reason to believe that the said Henry C. Thompson was not solvent, and believed that said Thompson was perfectly solvent, and were not informed and did not believe that said Thompson was insolvent until subsequent to the seventeenth day of July, 1890. And these defendants further answering, allege that when they received said sum of $15,577.54, they believed the said Thompson to be an honest and solvent man.

All which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA,

[SEAL.] By JOSHUA KIMBER, *Associate Secretary.*
E. WALTER ROBERTS.

DAVIES, SHORT & TOWNSEND,
Solicitors for Defendants, 32 *Nassau Street, N. Y.*

36 STATE OF NEW YORK,
City and County of New York, } *ss:*
Southern District of New York,

E. Walter Roberts, being duly sworn, deposes and says: I am one of the defendants above named; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge and so much thereof as concerns the acts or deeds of the defendant corporation I believe to be true.

(Signed) E. WALTER ROBERTS.

Sworn to before me this second day of October, 1891.

H. J. HEMMAN,
Notary Public (97), *N. Y. Co.*

37 EXHIBIT A.

The Real Estate, Title Insurance and Trust Company of Philadelphia, corner Tenth and Chestnut streets. Craig D. Ritchie, president; Charles V. MacManus, 2nd vice-president; Lewis S. Renshaw, secretary; Henry C. Thompson, solicitor.

PHILADELPHIA, *Decem.* 28, 1887.

REV. AND DEAR SIR: I enclose copy of will of the late Dr. Saul. The value of the estate so far as the executors are able to state it, will be about $12,000.

The board of missions I think may expect this sum in the summer or early fall of 1888.

Very truly y'rs, H. C. THOMPSON.

Rev. Mr. Kimber.

EXHIBIT B.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *Dec. 29th*, 1887.

Henry C. Thompson, Esq., 1001 Chestnut St., Phila.

MY DEAR SIR: I beg to acknowledge with thanks your favor of yesterday, just received, covering copy of the will of the late Dr. Saul and giving information as to probable time of payment.

Yours very truly,

(Signed) JOSHUA KIMBER,
Associate Sec'y.

38 EXHIBIT C.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *July 26th*, 1888.

Henry C. Thompson, Esq., solicitor, Philadelphia.

MY DEAR SIR: As the fiscal year of this society closes September 1st, I write to ask whether it is likely that the society's interest under the will of the late Dr. Saul can be paid by that date?

Very respectfully yours,

(Signed) WM. S. LANGFORD, *Gen'l Sec'y.*

EXHIBIT D.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *Sept. 17th*, 1888.

The Phila. Safe Deposit and Ins. Co., Henry C. Thompson, Esq., executors of the last will and testament of the Rev. Jas. Saul, D. D., deceased; the Rev. Benjamin Watson, D. D., c/o Mr. Henry C. Thompson, N. W. cor. 10th & Chestnut Sts., Phila., Pa.

GENTLEMEN: I send you herewith an attested copy of a preamble and resolution which fully explains itself, asking and authorizing you to convey to the Rev. Joseph Blount Cheshire, Jr., of Charlotte,
N. C., a certain lot of land in that city, standing in the name
39 of the late Dr. Saul and legally belonging to his estate. Our board of managers will be indebted to you if you will kindly carry out its wishes in this matter as soon as your convenience will

permit, since Mr. Cheshire has already been obliged to wait for three months for this action as the board does not meet in July and August.

Respectfully and faithfully yours,

(Signed) JOSHUA KIMBER,
Assoc. Sec'y.

EXHIBIT E.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *February 20th*, 1890.

Henry C. Thompson, Esq., executor, Philadelphia.

MY DEAR SIR: We received in Dec. 1887 a letter from you respecting the estate of the Rev. Dr. Saul in which you said that this society might expect to receive the residuary interest in the summer or early fall of 1888.

Will you kindly inform us further in the matter?

Very respectfully yours,

(Signed) WM. S. LANGFORD, *Gen. Sec'y.*

EXHIBIT F.

(Copy.)

PHILADELPHIA, 162 N. 20TH ST., *April* 15, 1890.

MY DEAR DR. LANGFORD: Has the treasurer yet received the legacy to the board of the late Dr. Saul? Mr. Thompson my co-executor promised me more than two weeks ago that you should have it this month; has it reached you? It is no fault of mine that the money was not paid over more than a year ago; and I am disgusted at the shilly-shallying which has deferred it to this late day. I have offered time and again to take the whole charge of the business, and relieve him of it. But as he is a lawyer and presumably a man of business, I could not press it. I am out of patience with the man. If we clergymen were as wanting in punctuality to engagements as this lawyer where would we be? What I would suggest is this—that is if the legacy is not forthcoming this month, so as to be acknowledged in the May number of the Spirit of Missions, you yourself should stir up the gentleman in the matter.

Very truly yours,

(Signed) BENJAMIN WATSON.

Mr. Thompson's address is Henry Thompson, Esq., 1001 Chestnut St., Phila.

EXHIBIT G.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *April* 17, 1890.

Henry Thompson, Esq., 1001 Chestnut St., Phila.

DEAR SIR: Not having heard from you in reply to my last Feb'y 20 inquiring about the bequest of Rev. Dr. Saul to this society, I write now to ask if you will inform us of the reason for delay in paying the legacy.

You wrote us in 1887 that we might expect it in the summer or early fall of 1888.

Sincerely yours,

(Signed) WM. S. LANGFORD, *Gen. Sec'y.*

41 EXHIBIT H.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *April* 17, 1890.

The Rev. Dr. Benj'n Watson, Phila.

MY DEAR DR. WATSON: Your favor of Apr. 15 is received. Mr. Thompson wrote us soon after the death of Dr. Saul that the money would be paid over in the summer or fall of 1888. Since then we have written to him twice but have received no response. I am glad to know that you will look after the matter for us. I will at once write to Mr. Thompson.

Sincerely yours,

(Signed) WM. S. LANGFORD, *Gen. Sec'y.*

EXHIBIT I.

(Copy.)

PHILADELPHIA, *April 25th*, 1890.

Mr. T. has just informed me that he will send on the money to-morrow.

Yours truly,

(Signed) BENJAMIN WATSON.

Postal card addressed:

Rev. W. S. LANGFORD, D. D.,
22 *Bible House, N. Y.*

EXHIBIT J.

(Copy.)

PHILA., 162 N. 20TH ST., *April* 29, 1890.

MY DEAR DR. LANGFORD: Did the money reach you the "next day," as I wrote you it probably would, or not?

I am anxious to know.

Very truly yours,

(Signed) BENJAMIN WATSON.

42 EXHIBIT K.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *May* 24, 1890.

DEAR DR. WATSON: What is the word about the legacy from Rev. Dr. Saul's estate?

We have heard nothing from your co-executor although we have written to him several times since he wrote that the legacy would be paid in the summer or fall of 1888.

It is almost a month since you wrote us that he had promised you that he would send it to us the next day.

Very sincerely yours,

(Signed) W. S. LANGFORD.

The Rev. Dr. Benj. Watson, Philadelphia.

EXHIBIT L.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *May* 28, 1890.

The Rev. Dr. Benj. Watson, Philadelphia.

MY DEAR DR. WATSON: I wrote to you a few days ago asking for information about the legacy of Rev. Dr. Saul to this society.

As I have not heard from you I fear my letter may have gone astray. It is very important that we should have a response at once and I have registered this letter to insure its reaching you.

Very sincerely yours,

(Signed) WM. S. LANGFORD, *Gen. Sec'y.*

43 EXHIBIT M.

PHILADELPHIA, 162 N. 20TH ST., *May 29th*, 1890.

MY DEAR DR. LANGFORD: My co-executor seems to be invulnerable to any shaft that you or I may send. After learning of the forfeiture of his last word, I wrote him as sharp and scathing a letter as I knew how. But it does not seem to have disturbed him a bit, for he has sent no reply. Yesterday I called at his office to give him a piece of my mind in spoken displeasure, but after waiting for him till I was tired I came away with my wrath still bottled up. I have now spoken to a lawyer on the subject (a prominent member of our church here) and he has promised to give me his assistance.

He says that Thompson is a good man, and a busy lawyer, but dilatory & procrastinating to the last decree; the latter I am quite sure is true—too true.

You may depend upon it I will now follow the matter up: for my own peace & quietness, if nothing else. For your information I will say, that most of the legacy is in bonds; so that it is accumulating interest to the credit of the legatee.

Faithfully yours, BENJAMIN WATSON.

EXHIBIT N.

MY DEAR DR. LANGFORD: I was just about to mail the accompanying when I received your registered letter. You will see from it why I did not reply to you as before; I wanted to see the gentleman. I will mail him yours at once. Perhaps it will stir him up to immediate action. If it does not, as I intimate in the accompanying, I will put into action means that will compel him to it. I hear all around that he is known as a very procrastinating man. But that has now gone far enough.

Yours truly, BENJAMIN WATSON.

44 EXHIBIT O.

(Copy.)

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

Est. Jas. Saul:

Bal. as per acc't filed	$14,927.54
Dividends received since not included in acc't	650.00
	$15,577.54

EXHIBIT P.

Resolved that the treasurer be instructed to apply so much of the gross amount received from domestic and general legacies to Sept. 1st, 1890, as may be required toward the appropriations for corresponding work to the same date.

45 *Plaintiff's Replication.*

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT Episcopal Church in the United States of America and E. Walter Roberts.

The replication of James Holly, complainant, to the answer and to the further answer and amendment to the answer of The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts, defendants.

These repliants, saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage and exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the said answer, and to the further answer, and amendment to the answer, for replication thereunto say, that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer, and the further answer, and the amendment to the answer of the said defendants, is uncertain, untrue, evasive, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer and the further answer and amendment to the answer contained, material or effectual in the law to be replied unto,
and not herein and hereby well and sufficiently replied unto,
46 confessed or avoided, traversed or denied, is true. All of
which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

Dated New York, December 22, 1892.

CEPHAS BRAINERD,
Complainant's Solicitor, 47 *Cedar Street, New York City.*

47 In the Circuit Court of the United States for the Southern District of New York.

HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH in the United States of America and E. Walter Roberts.

Testimony on behalf of complainant, taken before Samuel Bell, Esq., clerk United States circuit court, eastern district of Pennsylvania, special examiner by order of court, February 15, 1892, at his office in the city of Philadelphia, Pennsylvania, pursuant to notice.

PHILADELPHIA, *March* 5, 1892—11.30 a. m.

Present: The examiner (Samuel Bell), Mr. Burton, for complainant, and Mr. Hannis, for respondents.

Owing to the inability of Mr. Brainerd, one of counsel for complainants, to attend by reason of a professional engagement in New York, adjourned to 11.30 a. m. Friday, March 11, 1892.

PHILADELPHIA, SATURDAY, *March* 12, 1892—11 a. m.

Present: The examiner (Samuel Bell, Esq.), Messrs. Burton and Brainerd, for complainant; Mr. Hannis, associated with Davies, Short & Townsend, of New York, for defendants.

48 JAMES HOLLY, having been duly sworn, was examined as follows:

By Mr. BURTON:

1 Q. What is your business and where do you reside?

A. I am a merchant tailor, and I reside at 643 North Fifteenth street, Philadelphia. I am 62 years of age.

2 Q. Are you acquainted with the defendants, The Domestic and Foreign Missionary Society, and E. Walter Roberts?

A. I am not personally acquainted with them.

3 Q. You remember going there to their office do you not?

A. I went over there with you. That is the only knowledge I have of them. There was only one gentleman there. His name was Roberts, I believe.

4 Q. You only had one interview with them?

A. Yes, sir.

5 Q. And that is the only knowledge you have of them personally?

A. Yes, sir.

6 Q. Did you know Henry C. Thompson, and if so, how long did you know him?

A. I knew him, I suppose, twelve or fifteen years.

7 Q. What was his business?

A. Lawyer and conveyancer, and he was engaged with the Real

Estate Title Insurance Company, Tenth and Chestnut, as their attorney.

8 Q. Had you ever employed him in either of these capacities?

A. Yes, sir; I employed him in 1881, I think it was, to convey the property 1221 Walnut street to me as a purchaser.

9 Q. Did he attend to the conveyance?

A. Yes, sir.

10 Q. Did you employ him in any other capacity?

A. He insured the title. He got the company to insure it.

11 Q. Did you ever employ him as a lawyer in any other way?

A. Before that I employed him at one time as a lawyer.

49 I was acting as one of the executors for the estate of James Murrow, and we employed him as counsel to settle up the estate. I think that was about eleven or twelve years ago.

12 Q. When was the last time that you employed Mr. Thompson?

A. It was the time I bought the property where I reside, No. 643 North Fifteenth street. I bought it at Freeman's auction sale in 1890.

(Mr. Hannis objects to all the foregoing evidence, as immaterial and incompetent.)

The WITNESS: I went to one of the heirs and got the deed, and took it to Mr. Thompson to have the papers made out for me, and he told me that he knew all about that estate, and that it was all right, and that it was not necessary to have it insured, and I told him I didn't care about having it insured.

(Mr. Hannis objects to any conversations with Mr. Thompson.)

13 Q. About what time was it that you took the deed to him?

A. I think it was in May, 1890.

14 Q. You employed him to make out the papers?

A. Yes, sir.

15 Q. State how it was that you came to hand him any money at the time, and for what purpose you handed it to him.

(Objected to, as Mr. Thompson is not a party defendant to this record; any transactions or conversations with him are inadmissible.)

A. I took the deed to him, as I stated before, and he said that he knew all about that property, and it was not necessary to have it insured. I got that from Mr. Morgan, one of the heirs, and took the deed to Mr. Thompson, and he said he knew all about that property. I gave him the deed and told him I wanted him to make out the papers for me and have the property transferred to me.

16 Q. Coming down now to the time when you paid him over the purchase-money for settlement, state what occurred.

50 A. I went two or three times to see if the papers were not made out, and they were not made out. They had to have them signed by some of the heirs living up in the State. The last time I went to him, he told me that the papers were ready; that

everything would be right, and he would have everything settled in a few days; for me to give him a check; I gave him my check; he wrote me a receipt, and I left him. Of course, I didn't go near him for a time because he had made the papers for me on two occasions before and it was several weeks, if not months, before I received the papers always—always several weeks, if not months. I think there were some of those papers two or three months before I received them after he had made out the title.

17 Q. How much money did you pay him over, and is the receipt which I now show you the receipt for it?

(Objected to as immaterial.)

A. Yes, sir; I paid him a check for $12,000 on the Fidelity Trust Company.

18 Q. (Check handed witness.) Is that the check?

A. Yes, sir.

(Said check, marked "Exhibit A, March 12, 1892.")

The WITNESS: The paper now produced by me is the receipt that he gave me at the time I gave him the check.

(Receipt marked "Exhibit B, March 12th, 1892.")

(Above papers objected to as irrelevant.)

19 Q. What did you say he said that induced you to give him that check?

A. He said the papers were ready, and that he would have everything settled in a few days, and to leave my check, and he would have everything attended to in a few days.

20 Q. When did you next see Mr. Thompson about this matter?

A. I have never seen him since.

21 Q. When did you first hear from any source what Mr. Thompson had done with this money?

(Objected to as immaterial.)

51 A. That evening that I went to engage you (Mr. Burton) I then heard from one of the heirs. I went to you and engaged you as my counsel to attend to it for me. I received information from Mr Morgan.

22 Q. What information did you receive from him that induced you to act?

(Objected to.)

A. He told me that Mr. Thompson had gone to New York. That was Mr. Morgan, one of the heirs of the property that I bought. He told me that Mr. Thompson had gone to New York, and that he had attempted suicide in Jersey City; that he was in a hospital there; and then I thought it was time for me to go and see Mr. Burton.

23 Q. At that time, did you know that the money had been passed away to another person?

(Objected to.)

A. No, sir; I didn't know anything about what had become of the money.

24 Q. Had you heard anything from Mr. Thompson, by letter or otherwise, in the meantime?

A. Not a word.

25 Q. What did you do after you went to see Mr. Burton? Be particular and state it in the order of time.

(Objected to, as immaterial.)

A. Mr. Burton requested me to come the next morning to his office and bring my bank book, and that we would go to the bank and get the check, and we got the check. We went the next morning and got the check, had the book settled up, and went to the Union Trust Company, and found that it had gone through the Union Trust Company.

26 Q. You found that the check had gone through the Union Trust Company?

A. Yes, sir. They said that there was not $100 left to his account.

27 Q. Did you then pursue your investigation?

A. Yes; Mr. Burton and I went to New York, and went to Mr. Roberts, the assistant secretary.

28 Q. What day did you go there? Was it that day or the next day?

52 A. I think it was the second day that we went to New York, or a few days afterwards, at any rate. The assistant secretary was there. Mr. Burton made his statement. He handed him a note and asked him if he had received a note that he had sent him, and he said he had. I think he said he had given it to the secretary of the company—that they had been trying to get a settlement and get money out of Mr. Thompson for about a year or eighteen months, and that they couldn't get the money or a settlement.

(Objected to.)

29 Q. Do you know whether Mr. Burton presented him a statement of the account in the Union Trust Company at that time?

(Objected to.)

A. I saw him hand him a note of some kind; I don't know what it was; it was a paper of some kind.

30 Q. What did Mr. Roberts, the secretary at the desk, say that he would do in reference to the matter?

(Objected to, as immaterial.)

(Also objected to, as the witness has not said that he was the secretary.)

A. I understood that he was the assistant secretary.

By Mr. HANNIS:

31 Q. How do you know that?

A. Because I was told so.

By Mr. BURTON:

32 Q. By him at the time?

A. Yes, sir; he was the assistant secretary, he said there at the time. The secretary, I think he said, was out of town, if my memory is correct.

33 Q. Wasn't it the treasurer?

A. Or the treasurer. Yes; I know one of them he said was out of town.

34 Q. Did he not say that the treasurer was seldom there?

A. I don't remember that, but I know he said that he was out of town.

53 35 Q. What did he say that they would do about this communication?

A. I think he said that they had engaged a lawyer, or put it in the hands of a lawyer to attend to it.

36 Q. Did he make any further answer as to what they would do about it than that?

(Objected to.)

A. I don't remember now.

37 Q. Did he say that he would notify him or something like that?

A. I think he said he would notify Mr. Burton.

38 Q. Of what the answer would be?

A. Yes, sir; I believe he said that.

39 Q. What became of the auctioneer's receipt for $200?

(Objected to, as immaterial.)

A. I believe Mr. Thompson, Jr., gave it to you.

40 Q. You gave it to Henry C. Thompson?

A. Yes, sir, when I gave him the deed—the very same day, or the day I gave him the check. It was one of the two days—either the day I gave him the check or the day I gave him the deed.

41 Q. At the time when Mr. Morgan came to see you and gave you the information as to Thompson having gone away, did he tell you anything about whether the deed was ready or not?

(Objected to, as immaterial and irrelevant.)

A. He never mentioned the deed at all that I remember.

42 Q. Did he tell you whether he had been paid by Thompson?

A. No, sir; he was not paid. He told me he had not been paid—had not received a cent.

43 Q. That is what started you?

A. Yes, sir; that is what started me, of course.

44 Q. At your interview in New York with the secretary of the defendants, or the assistant secretary, did not Mr. Burton ask if they had not received a previous letter from him on this subject?

(Objected to.)

54 A. Yes, sir.

45 Q. Did they not acknowledge that they had?

(Objected to.)

A. Yes, sir; they said they had.

46 Q. Did he not say at that time that he would have their counsel communicate with Hannis, Parrish & Williams, of this city?

(Objected to, as irrelevant and leading.)

A. Yes, sir.

47 Q. Had you any knowledge of Mr. Henry C. Thompson's insolvency prior to the time when Mr. Morgan called upon you at the interview above referred to?

(Objected to.)

A. No, sir.

48 Q. Or any intimation of it in any way?

A. No, sir; if I had I wouldn't have given him the check, of course.

49 Q. Did you say whether you remembered my handing the secretary Thompson's account with the Union Trust Company?

A. I remember you handed him a note; I didn't know exactly what was in it; it was a paper.

50 Q. Is there anything else that you remember just now with reference to this matter, that you have *have* not mentioned about the interview at New York, or the interview with Thompson, when you handed him the money?

A. Nothing that I remember that would be of any importance.

Cross-examination (subject to the foregoing objections).

By Mr. HANNIS:

51 X Q. You had known Mr. Thompson, as you have said, twelve or thirteen years before this last transaction?

A. Yes, sir.

52 X Q. You had known him as a reputable lawyer and conveyancer, had you not?

A. I never heard of anything wrong about him before.

55 53 X Q. You believed him to be a reputable man?

A. I believed that he was an honest man, and I believed that he was engaged with the Real Estate Title Company, and that he was one of the stockholders and that he was all right on that account.

54 X Q. You had enough confidence in him to deposit this $12,000 with him?

A. Yes, sir.

55 X Q. You deposited this money with him on the 19th of June, 1890, did you not?

A. Yes, sir.

56 X Q. When was it that you first heard any rumors about Mr. Thompson that caused you to go to Mr. Burton?

A. It was the day that I went to Mr. Burton—that afternoon or

evening; it was the 14th of July, 1890; it was on the evening of the 14th of July that I employed Mr. Burton.

57 X Q. Between the 19th of June, 1890, and the 14th of July, 1890, you didn't see or call upon Mr. Thompson?

A. I did see and call upon him two or three times, and he told me that the papers were sent up the State to the heirs to be signed, and it would take some time before they would be ready. All this was before the 19th of June, but I didn't see anything of him since that time.

58 X Q. You didn't see or call upon Mr. Thompson after the 19th of June?

A. No, sir.

59 X Q. You have never seen him since?

A. No, sir.

60 X Q. When you first saw him, I understand you to say that he told you he knew all about this title?

A. Yes, sir; when I took the deed to him, he told me that that was all right—that he knew all about that. He mentioned the man's farm that this lot was on, and he said that was all right, and that it did not need insuring, and I told him I didn't care about having it insured; I had had the other two properties insured that he conveyed to me—that I didn't care about having it insured if it was all right.

61 X Q. If he knew all about the title, and it needed no insurance, why did you wait from the 19th of June to the 14th of July to hear from him?

56 A. I was there, as I told you, two or three times to see him, and he told me that the papers were sent up the State.

62 X Q. You are getting wrong again. I mean from the 19th of June—the time you gave that check. Why did you wait between the 19th of June and the 14th of July before calling upon him again, after you deposited the money?

A. I expected that he was making out the papers for me.

63 X Q. You were waiting to hear from him?

A. Yes, sir.

64 X Q. You did not trouble yourself about the money?

A. No, sir; not from the time I gave him the check until I got the news that he had gone to New York.

65 X Q. You had confidence enough in him to know that he was doing about what you supposed was all right?

A. I believed that he was doing what was right.

66 X Q. You trusted him?

A. I trusted him; yes sir.

67 X Q. You have stated all that occurred between you and Mr. Thompson as to this transaction, have you not?

A. That is all that I remember of it.

Redirect examination.

By Mr. BURTON:

68 Q. You knew that the deed to you had to be recorded?

A. Yes, sir; and on previous occasions; it took, I suppose, some-

times, months before I would receive the papers, after I had given him the money.

69 Q. It takes a month, sometimes, to get a paper recorded, don't it?

A. Yes, sir; I know it generally takes three or four weeks to record it, and sometimes he didn't give me the papers for, perhaps, two or three months; and I was in no hurry, because I had confidence in the man, that it was all right, as long as it was paid for.

57 HENRY C. THOMPSON, JR., having been duly sworn, was examined as follows:

By Mr. BURTON:

1 Q. What is your occupation?

A. I am a member of the Philadelphia bar, and have been such since July, 1885. I am a son of Mr. Henry C. Thompson.

2 Q. You are also the assignee for the benefit of creditors of your father?

A. Yes, sir.

3 Q. As such, did you come into possession of your father's bank books and other papers?

A. I did.

4 Q. Will you produce the bank book of the Union Trust Company, if you have it in your possession?

A. I will.

(Producing and handing same to counsel.)

(Said bank book offered in evidence by counsel for plaintiff, covering date June 19, 1890, showing deposit on that date by Henry C. Thompson of $15,000. Marked "Exhibit C, March 12, 1892.")

(Objected to on behalf of the defendants. As Henry C. Thompson is not a party defendant in this cause his books and papers are not evidence. This objection is meant to cover all subsequent offers of books and papers of Henry C. Thompson, so as to avoid repeated objection.)

Mr. BURTON: In addition to that, I ask for the production of the day book kept by Mr. Thompson.

(The witness produces said day book, which is marked "Exhibit D, March 12, 1892.")

Mr. BURTON: This book shows transactions as follows:

JUNE, THURSDAY, 19, 1890.

Est. Jas. Robinson.	Paid Maule comm.....	.....	100 00
	Per Maule ½ "	50 00	
Est. Jas. Saul.	P. E. Miss.....	.....	15577 54
R. E. Title Co.	Trego note (judgment).....	.....	507 58
James Holly.....	.....	12000 00	
James Robinson ac't Mary Grew, Jr.....		1500 00	
Jos. W. Robinson....	.....	1500 00	
Union Tr. Co.....	.....	.....	15000 00

58 5 Q. Have you the cancelled check of $15,000 referred t
in that account?

A. I have. (Producing same, which is marked "Exhibit E, Marc
12, 1892.")

6 Q. When did you first give information to Mr. Holly or hi
counsel, Mr. Burton, about that check?

(Objected to as immaterial.)

A. I cannot recall the exact day. Things about the 10th of Jul
happened pretty lively and rapidly, but it was about the time m
father attempted suicide.

7 Q. It was shortly afterwards, was it not?

A. Yes, sir.

8 Q. It was not before that?

A. No, sir.

9 Q. What was the date when your father attempted suicide?

A. July 10, 1890.

10 Q. Do you remember what day of the week that was?

A. Friday.

11 Q. Do you remember whether it was published in the news
papers before Saturday?

A. No, sir; it was not. I first saw it in the New York Heral
Saturday morning, which was the first intimation that I had of i
It was published in all the papers on Saturday morning. That wa
the first intimation that I had of it.

12 Q. What was the date when you became assignee for the benef
of creditors?

A. I went right on on Saturday. Saturday morning I first hear
of it and went right on to New York, and stayed there until Mo
day, which would have been the 13th. Came home on the 13t
and I think went back again on Wednesday morning, had the a
signment signed, and came back. That would be on the 15th.

13 Q. You came back on Wednesday morning, having had th
assignment executed that day?

A. Yes, sir; at nine o'clock that morning. I took the Chicag
limited, came here, put the assignment on record, and about a
hour after I had done so Mr. Holly's attachment came.

59 14 Q. Mr. Holly issued an attachment and served it upo
you?

A. Yes, sir; after the assignment had been placed on record.

15 Q. That was on the same day that you came back from Ne
York?

A. Yes, sir.

16 Q. Had you seen Mr. Holly previous to that time in referen
to this matter? I mean between the 19th of June and that time

A. I don't know. I don't think I saw Mr. Holly. Yes, come
think of it, I think I sent him a note. Yes, I wrote a note to hi
I came home on Monday from New York, and that night I se
Mr. Holly a note, because my father had told me that he was co
plicated with Holly, and gave me a list of people whose mone

he had misappropriated, and Mr. Holly's name was among the number.

(Objected to as immaterial and irrelevant.)

The WITNESS: I wrote to Mr. Holly at once that night and I think I saw him the next day. I do not recall when I saw him, or whether I saw him alone or with Mr. Burton. As I have said before, things happened pretty rapidly.

17 Q. Then you think you saw him on the 15th?

A. I presume so. I sent a note on Monday night, and I presume, with the newspaper's publicity and the note from me, he came right down.

18 Q. Has Mr. Thompson been anywhere within the jurisdiction of this court, or Pennsylvania, to your knowledge, since then?

(Objected to as irrelevant.)

A. I must decline to answer that question.

19 Q. For how long a time, if you know, was Mr. Thompson at Jersey City or laid up with the wound from the attempted suicide?

(Objected to as irrelevant.)

A. I think about ten days.

60 20 Q. Was he all that time in Jersey City?

A. Yes, sir.

21 Q. Where was his actual residence at that time?

A. That I don't know. He always claimed to be a citizen of Pennsylvania. He never voted in Jersey. He never exercised any of the rights of citizenship in New Jersey, but in order that you may understand that answer, I will say that Beverly, New Jersey, was his summer residence. He used to come to Philadelphia in the winter time. At times, he used to spend his winters and summers in New Jersey, and that being so for several years he did not use to come to Philadelphia at all. Then he would come for two or three years hand-running, so that between the two he lost his fixed residence in Philadelphia; that is, his house residence, but he never claimed to acquire any in New Jersey, and never voted in New Jersey.

22 Q. He had no known residence, had he, for some time previous?

A. Well, I cannot say how long it was. I know that during the last ten years possibly, he spent six winters in Philadelphia.

23 Q. He never lived in the State of New York?

A. No, sir.

24 Q. Did he not practice law in the State of New Jersey, also in Burlington county?

A. No, sir; he was not a member of the New Jersey bar, and declined all New Jersey business.

25 Q. Was he not the executor of some estate in Jersey?

A. Yes, sir.

26 Q. He was executor and had trust matters?

A. Yes, sir. The reason he declined New Jersey business was on

account of being in Beverly as his summer home, and he did not care about being bothered through his leisure hours with Jersey and country business. His place of business was in Philadelphia, and when he got home at night he didn't wish to be annoyed. That is, while he was in Beverly.

27 Q. Speaking of the word inhabitant, would you not hold that he was an inhabitant of the State of New Jersey during all this time, from your knowledge of him?

(Objected to.)

61 A. Well, he was an inhabitant while he lived there, certainly. There was always a dispute between he and I as to the residence. I always claimed a residence in New Jersey and voted there. We lived in the same house. He declined to recognize himself as a citizen of New Jersey, and refused to vote there, and I think he did vote in Philadelphia.

(Objected to.)

28 Q. Did he not have his church relations there at Beverly?

A. Yes, sir; and Philadelphia also. He claimed that residence was a matter of intention, and that he never intended to reside there. I wanted to vote there and I voted.

29 Q. Referring to the account mentioned in Exhibit D, in whose handwriting are those entries on that account?

A. Henry C. Thompson's.

30 Q. Did you know of your father being one of the executors of the estate of Rev. James Saul, deceased?

(Objected to.)

A. Yes, sir.

31 Q. As assignee for the benefit of creditors, have you examined the books of Mr. Thompson and his bank accounts with a view of ascertaining whether any funds of Saul's estate were ever deposited in this bank account with the Union Trust Company?

(Objected to as irrelevant and incompetent testimony.)

A. I have in a very cursory way in the presence of Mr. Hannis and Mr. Burton at my office last Saturday. I have here an account of the Saul estate taken from Mr. Thompson's books. This is an account of the moneys received and distributed by my father in the matter of the estate of James Saul. Last Saturday, Mr. Burton, Mr. Hannis and myself were in my office with this account before us.

(Objected to, as to all that occurred relating to the books.)

The WITNESS: We had this account before us and the bank books of the Union Trust Company, with the book of the
62 Sixth national bank, the pass book M, of the Sixth national bank. I think that all the items on the credit side of the account, that is, the receipts, with the exception of the first one $2,493.03, corresponded with deposits made as shown by the pass book in the Sixth national bank.

In reference to the first item, we did not have the pass book of the Sixth national bank for that date, December 29, 1887. That item is $2,493.03. I have been unable to lay my hands on that pass book. The day book of December 29, 1887, however, shows that amount of money deposited in the Sixth national bank, by a memorandum in Mr. Thompson's handwriting on that date. To that extent I have examined the books to ascertain in what banks the Saul money was deposited.

32 Q. My question is, Did any money of Saul's estate, from your examination, appear to have been deposited in the bank account of Mr. Thompson with the Union Trust Company?

(Objected to.)

A. No, sir.

(Mr. Hannis objects to all the books and papers of Mr. Thompson, but if any of the papers are admissible in evidence, he thinks this cash account taken from the books should likewise, as explanatory, be offered in evidence, but subject to his general objection, covering all the papers.)

Counsel for complainant answer that they have no objection to the papers referred to going in evidence subject to objection, but they desire to accompany this with the fact that their simple question was whether any of the funds of Saul's estate had come into the bank account of the Union Trust Company, and the answer being that there had not, they would be satisfied, whether it is left out or left in.

Mr. HANNIS: The witness, however, in order to reach that answer, found it necessary to resort to this paper taken from the books to be able to answer the question.

Mr. BURTON: We do not object to its going in in that way, except that we ask to have copies of the various entries to which that account refers.

(Marked "Exhibit F, March 12, 1892.")

63 33 Q. Do you know of any instance in your examination of any moneys of the Sixth national bank, since the time when the Saul estate was being received by Henry C. Thompson, being transferred to the bank account of the Union Trust Company?

(Objected to.)

A. No, sir; I know of no such transfer.

34 Q. Would you not have been likely to have found it on that examination, if it had occurred, speaking in general terms?

A. No, sir; for the reason that my examination was of the most cursory kind. I presumed that all I was wanted for was to identify the books and let the books speak for themselves. If I had been given an intimation that tracings of any transfers from one account to another were wanted, I would have endeavored to have had such account, but the books are here and speak for themselves.

35 Q. From your knowledge of your father's transactions, have

you any reason to believe that he transferred the deposits at any time of the Sixth national bank to the Union Trust Company?

(Objected to.)

A. I have every reason to believe that no such transfer between the two banks, from one to the other, was ever made. The Sixth national bank is located at Second and Pine, some ten or twelve minutes' walk from the office. It was my work, as a student in the office, to make deposits in bank. The Union Trust was only a minute or two from the office, and there were times when I suggested to Mr. Thompson, close on to three o'clock, that it would be just as well if checks were out on the Union Trust Company, or the Sixth national, to deposit in the nearest bank. He has frequently said to me that he did not care to draw a check on one bank and deposit it in another bank, as he didn't want the two banks to know that he was keeping another account. He wanted the banks to think that he was keeping his account all in one bank. He was getting a discount at the Sixth national, and the Union Trust account was opened as a sort of petty account for convenience of cashing some checks in the office work—costs, expenses, and such things as that.

64 36 Q. Then, so far as your knowledge of his transactions was concerned, and only so far as your knowledge was concerned, he did not transfer?

(Objected to.)

A. No, sir; he never transferred. I am quite positive of that. His main account was in the Sixth national bank, and the Union Trust Company account was opened as a petty cash account, subsequently growing to larger proportions, and the Sixth national account dwindled as the years approached 1890.

By Mr. BRAINERD:

37 Q. Did your relations to Mr. Thompson's bank accounts continue right along down to the time of this disaster, of which you have spoken, as you have described them now?

A. Yes, sir; his office was at Tenth and Chestnut, and mine was in the Drexel building, and he frequently had to send his boy down to me to make a deposit for him.

38 Q. So that the knowledge of which you have spoken continued down to the time of the disaster?

A. Yes, sir; personal knowledge.

By Mr. BURTON:

39 Q. State what was the amount standing to the credit of your father in the Sixth national bank at the date of the last settlement previous to his going away, giving the date and the actual account of money.

(Objected to.)

A. At the time he went away, there was $92.33 to his credit in

the Sixth national bank. On June 5th, the amount standing to his credit in the Sixth national bank was $518.84; but at the time he went away, on the 10th of July, 1890, it was reduced by small checks drawn, to the sum of $92.33.

40 Q. Please give the deposits made in the Sixth national bank since the 5th of June, consecutively.

(Objected to.)

A. Balance, June 5th, $518.84; June 16th, $300; June 24th, $100; July 7th, $100. That is all. There was no deposit made after the 7th of July.

65 41 Q. Those deposits had been all drawn out except $92.33?

A. Yes, sir.

42 Q. By how many checks?

A. Twenty-two checks.

43 Q. The largest of those was for how much?

A. $300.

44 Q. The gross amount for the period which you have specified is how much?

A. $1,018.84 of deposits, against which were drawn—I have not the exact amount of checks drawn, but it was all drawn except $92.33. That balance of $92.33 was applied as a banker's lien to a note which the bank held, given by him.

By Mr. BRAINERD:

45 Q. Did the senior Mr. Thompson keep other bank accounts than the two which you have specified?

A. No, sir; the Sixth national and the Union Trust were the only bank accounts he ever kept.

46 Q. The Union Trust was a corporation in Philadelphia, was it not?

A. Yes, sir.

47 Q. Did he keep a separate account for trust funds, or did he deposit all his money in those two accounts which you have now referred to?

A. He kept no special account for trust moneys. They all went into his personal account—those two accounts.

By Mr. BURTON:

48 Q. Then he never kept any special account of the Saul estate?

A. No, sir.

49 Q. You were subpœnaed to produce any letters that were received from the Domestic and Foreign Missionary Society, were you not, or papers relating to this matter?

A. I believe I was subpœnaed to produce almost everything; I suppose that was among the list.

50 Q. Have you any letters received by Mr. Thompson from them?

Q. No, sir; no letters received by Mr. Thompson from the mission.

66 By Mr. HANNIS:

51 Q. You don't say that there were no letters, but that you found none?

A. No, sir; there is a bundle of Saul papers that I left down at the office, which I forgot to bring up; I will send for them now. (Sending for same.)

By Mr. BURTON:

52 Q. Did your father keep a letter-press copy book of letters that he wrote?

A. No, sir.

53 Q. Have you found among his papers, other than those which you have sent for, any copies of letters written by him to the Domestic and Foreign Missionary Society?

A. No, sir; I have not really looked for them, because he kept a letter-press book that he used to copy a letter in about once every year and a half, with no regularity. Sometimes he happened to keep copies of accounts that he would send out in that letter-press copy book. I never supposed that there would be any there and I didn't ook, but I can produce it if you wish it.

Cross-examination (subject to the foregoing objections).

By Mr. HANNIS:

54 X Q. In what State was your father born?

A. In Philadelphia, Pennsylvania.

55 X Q. This was the domicile of his birth?

A. Yes, sir.

56 X Q. He was admitted to the bar here and practiced here for many years, did he not?

A. Yes, sir.

57 X Q. In what State and county did you record the assignment which he made for the benefit of creditors?

A. Philadelphia county, Pennsylvania.

58 X Q. Our statu-es require that such an assignment is only valid when recorded in the county of his residence, and within thirty days after its date, does it not?

(Objected to as having nothing whatever to do with this inquiry.)

67 A. Yes, sir.

59 X Q. In recording this assignment in Philadelphia county, you treated that county as being his place of residence?

(Objected to; what this witness treated or considered does not establish the fact. The witness has stated the facts relating to residence.)

A. In recording the assignment, I did not consider the question of residence, domicile, citizenship, or anything of the kind. It was recorded in Philadelphia for two reasons. First, because he owned, as I supposed, considerable property here at the time; but it was recorded mainly to stave off suits. At the time the assignment was

put on record by me, I knew that everything was gone and that there was nothing. Those are the circumstances surrounding the recording of the assignment.

60 X Q. You are a member of the bar and have been since 1885?

A. Yes, sir.

61 X Q. Do you not know, as a lawyer, that an assignment, to be valid, must be recorded within thirty days and in the county where the assignor resides?

(Objected to; first, as to the question of law, that is to be shown by the statute; second, this whole matter is immaterial to the question now in dispute.)

A. I don't know as to the assignment being recorded in the county where the assignor resides being the law of this State. I know the law is that an assignment must be recorded in every county where there is any property. The question of residence, I don't think, enters into it, but at the same time I did not consult the assignment act. I did not consider that the assignment was of any account, and it was only done for the purposes which I have stated before, and not for the purpose of collecting any money under it.

62 X Q. You have stated, in reply to Mr. Burton, that Mr. Holly commenced an action by an attachment against Henry C. Thompson?

A. Yes, sir.

63 X Q. Was that to recover the amount of this deposit?

(Objected to; the record is the best evidence.)

68 A. I don't know the facts set up in Mr. Holly's statement of claim. No statement of claim was ever served on me with the writ, and I never cared to ferret it out myself—to go to the court to look at the original affidavit—as I presumed I knew about what it was, and I never read any more of those affidavits than I have to. I never saw the affidavit upon which the attachment under the act of 1869 was based. None was ever served on me. I was only served with the writ.

64 X Q. That action is still pending, is it not?

(Objected to, as showing for itself; also objected to, as immaterial.)

A. Yes, sir.

65 X Q. These two accounts which your father kept in the Sixth national bank and in the Union Trust Company were kept in his individual name, were they not?

A. Yes, sir.

66 X Q. The statement, Exhibit F, which you have produced, was copied by you from the books of your father, was it not?

A. Not by me personally, but under my direction. We verified it, however, and it is correct.

67 X Q. This paper purports to give the cash received by Mr. Thompson in the matter of the estate of James Saul, and also the cash he paid out, with the dates of the receipts and payments, and

from what source they were received, and on what account they were paid, does it not?

A. Yes, sir.

68 X Q. Please turn to Exhibit F, and say between what dates the cash was received by your father in the Saul estate.

A. December 29, 1887, and March 11, 1889.

69 X Q. Do the books marked "Excelsior Journals," state where that money was deposited?

A. Yes, sir.

70 X Q. Where do they state that it was deposited?

A. In the Sixth national bank.

71 X Q. The last of the moneys was received March 11, 1889?

A. Yes, sir.

69 72 X Q. Look at the bank book in Sixth national bank on March 12, 1889, and say what was the balance as settled in the bank.

A. There is no balance on March 12.

73 X Q. What was the balance March 5, 1889?

A. $315.99.

74 X Q. What was the total of the moneys deposited from the Saul estate between the dates of December 29, 1887, and March 11, 1889?

A. $18,912.78.

75 X Q. And the account book shows that all that money was drawn out of Mr. Thompson's bank on March 5, 1889, except $315.99. Is that so?

A. Yes, sir.

76 X Q. No part of those moneys so paid out, to your knowledge, was paid to the board of domestic and foreign missions, was it?

A. No, sir.

(Mr. Hannis thinks that as the books are in evidence, copies of the bank account ought to be annexed as exhibits also.)

(Counsel for complainant do not object.)

77 X Q. Turn to the check book in the Union Trust Company, and state what checks were drawn on that account by Mr. Thompson on June 19, 1890.

A. Check to Edward Maule for $50; P. E. church, R. of missions, $15,577.54; Real Estate Title, Insurance and Trust Company, Philadelphia, $507.58. That is all. Those checks were drawn in the order named.

78 X Q. Turn to the next day and state what checks were drawn.

A. Joseph R. Tindall, $10; L. H. Buffington, $42; those are the only ones drawn on that day.

June 21.	Thomas Wanner	$250 00
June 23.	Change	15 00
June 24.	Chestnut Street Saving Fund Co	7,661 25
" "	S. A. Atkinson, Mt. Holly	50 00
" "	Sixth national bank	100 00

70 That is the first check I ever knew him to draw from one bank on the other. That was shortly before his leaving.

June	25.	Change	$15 00
"	26.	Clerk of orphans' court	20 00
"	27.	Change	10 00
"	"	Samuel Cruthers	280 00
"	"	Daniel L. Jones	33 00
"	30.	Harry B. Cox	447 50
July	1.	Change	10 00
"	"	James Alcorn	103 97
"	2.	Mary Megonegal	215 00
"	"	Real Estate Title Co	7 50
"	"	James Courley, Tr	1,242 17
"	"	John Taylor, receiver of taxes	29 75
"	"	Samuel Loag	1,426 14
"	"	Martha A. Wilson	302 83
July	3.	Emanuel Westenburg	42 00
"	8.	Rose Kenny	10 50

Those are all.

79 X Q. All those checks were paid through the Union Trust Company and charged to his account?

A. Yes, sir.

Redirect examination.

By Mr. BURTON:

80 Q. The books, Excelsior Journals, show the transactions of each day relating to each one of those checks?

A. Yes, sir.

81 Q. What was the balance standing to the credit of Mr. Thompson in the Union Trust Company at the last settlement previous to June 19, 1890?

A. May 17, 1890, the balance was $735.71.

82 Q. Please read the subsequent deposits to that date.

A. May 19, $500; May 22, $987; May 24, $300; May 29, $1,471.60; May 31, $514 68; 10th June, $1,674.32; 6th June, $506.92; 16th June, $4,500; 19th June, $15,000; 20th June, $104.35; 24th June, $8,000; 30th June, $333.34; 1st July, $287; 2nd July, $1,879.61. That is all. Interest to June 1, 1890, $10.37, being included in balance of $467.91. That was on the 8th of July, 1890. That is, there was a balance of $467.91.

71 83 Q. Please state the checks on the balance of May 17, 1890, of $735.71, and the deposits made subsequently thereto to the closing of the account; that is, to the point where Mr. Hannis's checks are presented.

(Objected to, because the book will speak for itself, and the proper way is to have a transcript of the same made.)

A.—

May 21, 1890.	James Allen	835 45
" 21,	Fidelity Trust Co.	422 00
" 22,	Real Estate title Co.	750 00
" 22,	H. L. T.	50 00
" 21,	C. P. McNealy	86 63
" "	Lukens & Montgomery	175 00
" "	James K. Duffie	300 00
" 22,	M. Thomas & Sons	165 00
" 23,	H. M. Piersoll	67 50
" 24,	G. M. Conarroe	500 00
" 31,	William J. Thomason & Sons	16 80
" 31,	Joseph R. Rhoads	75 00
June 5,	Joseph W. Robinson	150 00
" "	Union Trust Co.	48 17
" "	Joseph M. P. Price	711 83
" 13,	Francis C. Wayne	86 63
" 16,	Sixth national bank	200 00
" "	Joseph A. Robinson.	200 00
" 17,	Daniel H. Buck	924 95
" "	E. G. Watmaugh	4,066 67

This goes down to the checks which I have heretofore given.

84 Q. Do you know what the check to the Chestnut Street Saving Fund Company was given for, and on account of what, or whether it was to the account of any deposit made in that bank, and if so, what?

(Objected to; the book must speak for itself.)

A. On June 24, 1890, Mr. Thompson deposited the check of James H. Little, *et al.*, trustees, under the will of William Bucknell, deceased, for $8,000. That money was given Mr. Thompson by Mr. Little to loan to Thomas W. Price on a mortgage on Price's property in West Philadelphia. The Chestnut Street Saving
72 Fund were the owners of the mortgage, and the money was paid to them, and the mortgage satisfied by them on June 24th.

85 Q. What was the check of $4,066.67 to Watmaugh?

A. That was money which Mrs. Watmaugh had deposited with Mr. Thompson.

86 Q. That was money that had previously been received on Watmaugh's account, was it not?

A. He had that amount of Watmaugh's in his possession and she asked for it, and he drew a check for it.

87 Q. (Paper shown witness.) Is that paper now produced by you one of the papers relating to the Saul estate?

A. That is a paper found by me in a box containing papers of Mr. Saul.

(Marked for identification "Exhibit G, March 12th, 1892," to be objected to when offered in evidence.)

88 Q. (Another paper shown witness.) The paper I now show you is produced by you. Isn't that one of the letters found among Mr. Thompson's papers?

A. Yes, sir.

(Marked for identification "Exhibit H, March 12, 1892.")

The examiner notes that this is the same as Exhibit C, in the supplemental answer.

Witness also produces paper which is offered in evidence by counsel for complainant, and marked "Exhibit J, March 12, 1892."

(Objected to as irrelevant.)

89 Q. Did you not tell us, or from your memory are you not able to state that Mr. Thompson had not voted in Pennsylvania for ten years or more prior to his leaving (referring to letter containing such a statement)?

A. No, I do not think that is correct. I think he has voted inside of ten years.

90 Q. Has he inside of five years?

A. I see that I have stated in that letter what you have asked me about, but I have just as much information now as I had then. I do not see, however, why I said that because I do not think it is correct.

91 Q. Within what time can you say he did vote?

73 A. I cannot say. During the last ten years the only place that he has lived in Philadelphia has been on Spruce street, east of Eleventh.

92 Q. He had been away from there how long before?

A. Not over two or three years. Two years or thereabouts.

93 Q. He was not assessed there, or any place that you know of?

A. Yes, now I think of it; he did get one of the pink slips under the Fox act of 1885, for the assessment of personal property. How he settled it, I don't know. It runs through my mind that he told me he did not make any answer, and they assessed him at $10,000 and increased it 50 per cent., and he paid it rather than make any disclosures.

94 Q. Have you ever known of his being assessed since that time?

A. Not on personal property. Of course, he paid a real-estate assessment. It was not necessary for him to pay any assessment for voting purposes, because his tax receipt would have been sufficient for that.

95 Q. Have you found any other letters or copies of letters?

A. None, except this bundle of Saul papers.

By Mr. HANNIS:

96 Q. Have you a certified copy of the will of Dr. Saul?

A. Yes, sir; it is here. (Producing same.)

Mr. Hannis offers said certified copy in evidence without objection, and it is marked "Defendants' Exhibit K, March 12, 1892."

It is as follows:

COMMONWEALTH OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

By the tenor of these presents, I, William B. Kinsley, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania,

[SEAL.]

Do make known to all men, that on the twenty-third day of December, A. D. 1887, at Philadelphia, before me was proved
74 and approved, the last will and testament of James Saul, deceased, (a true copy whereof is to these presents annexed), having whilst he lived, and at the time of his death, divers goods, chattels, rights and credits, within the said Commonwealth by reason whereof the approbation and insinuation of said last will and testament, and the committing administration of all and singular the goods, chattels, rights and credits, which were of the said deceased; and also the auditing the accounts, calculations, and reckonings of the said administration, and absolute care of the same, to me are manifestly known to belong; and that administration of all and singular the goods, chattels, rights and credits of said deceased any way concerning his last will and testament, was committed to Benjamin Watson and H. C. Thompson, executors, in the said testament named, they having first been duly sworn well and truly to administer the goods, chattels, rights and credits of the deceased, and make a true and perfect inventory thereof and exhibit the same into the register's office of Philadelphia, on or before the 23rd day of January next, and to render a just and true account, calculation, and reckoning of the said administration, on or before the 23rd day of December, one thousand eight hundred and eighty-eight, or when lawfully required; and also to diligently and faithfully regard, and well and truly comply with the provisions of the act relating to collateral inheritance.

In testimony whereof, I have hereunto set my hand and seal of office, at Philadelphia, this 23rd day of December in the year of our Lord, one thousand, eight hundred and eighty-seven.

WILLIAM G. S. SHIELDS, *Register.*
—— ——, *Dep.*

Know all men by these presents, that I, the Reverend James Saul, D. D., residing in the city of Philadelphia, in the State of Pennsylvania, do hereby make, declare and publish this my last will
75 and testament in manner following that is to say. I hereby revoke all legacies specified in my will dated the first day of May, A. D. 1866, and any codicils thereto heretofore executed by me. And I now continue and confirm in full force and virtue my bequests of the whole of my estate to the following institutions and in the following proportions, viz: to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, three-fourths of the whole of my said estate conditioned that the amount thus bequeathed shall be appropriated by said society in equal proportions of one-third to domestic missions, one-third to foreign missions and one-third to the benefit of the

colored people in the Southern or formerly slave States for the support of schools and missions. The remaining one-fourth of the whole of my said estate I give and bequeath to the theological seminary near Alexandria, Virginia, the legal title of which is "the Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia." I hereby continue in the office constituting and appointing as my true and lawful executors the Philadelphia Trust, Safe Deposit and Insurance Company, of the city of Philadelphia, State of Pennsylvania, and Henry C. Thompson, Esquire, of said city and State my joint executors of this, my last will and testament, with full seizen of all my property, real, personal, and mixed, with full power and authority to sell and transfer the same without application to any court.

In the event of the death of said Henry C. Thompson, I appoint Ephraim Clark, Esquire, of the said city of Philadelphia, to be my true and lawful executor in his stead with like powers, and as a joint executor with the trust company aforementioned.

In witness whereof, I, James Saul, the above-named testator, have hereunto set my hand and seal this sixth day of June, A. D. one thousand and eight hundred and eighty-two.

JAS. SAUL. [SEAL.]

Signed, sealed, declared, and published by James Saul, the above-named testator, to be his last will and testament in the presence of us.

JOHN MASON.
H. W. BIDDLE.

76 *Codicil to the Last Will and Testament of Rev. James Saul, D. D.*

I, the Rev. James Saul, D. D., of Philadelphia, do hereby declare this a codicil to my last will and testament, dated Philadelphia, June 6th, 1882, duplicate of which is hereunto annexed, which will and testament I declare to be in full force and effect in all its provisions, except as to the bequest or legacy to "the Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia," which bequest I hereby declare null and void, having substituted therefor a donation of one hundred shares Pennsylvania railroad stock, and transferred the same to the trustees of the aforesaid seminary on the 2nd of July, 1885.

In witness whereof I have hereunto set my hand and seal this fourteenth day of August, 1885, at Saratoga Springs, State of New York.

JAS. SAUL. [SEAL.]

Witness to the signature of Rev. James Saul, D. D.
SIDNEY C. STEWART.

Second Codicil to the Last Will and Testament of Rev. James Saul, D. D.

I, the Rev. James Saul, D. D., of Philadelphia, do declare this a second codicil to my last will and testament, dated June 6th, 1882,

duplicate of which is hereunto annexed, which will and testament I declare to be in full force and effect in all its provisions except as to the bequest or legacy to "the Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia," (which was annulled by the first codical to my said will), and except the appointment of Ephraim Clark, Esquire, now deceased, to be one of my executors in the event of the death of Henry C. Thompson, I do now hereby appoint Rev. Benjamin Watson, D. D., residing now at No. 162 North Twentieth street in the city of Philadelphia, to be also one of my executors conjointly with the Philadelphia Trust, Safe, Deposit and Insurance Company of the city of
77 Philadelphia, and Henry C. Thompson, Esquire, of said city, and with the same joint powers and authority as are conferred on the last two named executors by my said will. And further I do hereby give, devise, and bequeath to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and their successors, all the residue of my estate not disposed of by my said will as amended by the said first codicil thereto.

In witness whereof, I, the said Rev. James Saul, D. D., have hereunto set my hand and seal this eleventh day of December, A. D. 1885, at Philadelphia, in the State of Pennsylvania.

JAS. SAUL. [SEAL.]

Witnesses to the signature of Rev. James Saul, D. D.:
ALFRED L. CAREY,
No. 523 *Chestnut St., Phila.*
JAS. POLLOCK,
133 *N'th* 21*st St*, *Phila.*

John Mason and H. W. Biddle, the subscribing witnesses to will, affirmed December 16th, 1887.

WM. G. SHIELDS,
Dep'y Register.

Alfred L. Carey and John Mason affirmed December 19th, 1887, to signature of Jas. Saul to codicil dated August 14th, 1885.

WM. G. SHIELDS,
Dep'y Register.

Alfred L. Carey, one of the subscribing witnesses to codicil dated December 11th, 1885, affirmed December 19th, 1887.

WM. G. SHIELDS,
Dep'y Register.

Jas. Pollock, one of the subscribing witnesses to codicil dated December 11th, 1885, sworn December 13th, 1887.

WM. G. SHIELDS,
Dep'y Register.

Benjamin Watson and H. C. Thompson, the executors within named, sworn December 23rd, 1887, and letters testamentary granted

unto them. The said testator died November 16th, A. D. 1887, at 8 a. m.

WM. G. SHIELDS,
Dep'y Register.

The Philadelphia Trust, Safe Deposit and Insurance Company, one of the executors within named, renounced their right to act.

78 Rev. BENJAMIN WATSON, having been duly sworn, was examined as follows:

By Mr. BURTON:.

1 Q. You are one of the executors in Dr. Saul's estate?

A. Yes, sir.

2 Q. You were subpœnaed to produce any correspondence between you and the Domestic and Foreign Missionary Society relating to the legacy given to the society by Dr. Saul's will?

A. Yes, sir.

3 Q. Were you connected with the Domestic and Foreign Missionary Society in any way since the death of Dr. Saul?

A. No, sir.

4 Q. Will you produce whatever papers you have a list of, which you have been subpœnaed to produce?

A. I will (producing papers). These are all the letters that I have. It was by mere accident that I saved these. Of course, I did not consider that they would amount to anything.

The letters produced by this witness are two in number, one dated April 17, 1890, and the other May 1, 1890, and they are as follows:

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *April 17th*, 1890.

The Reverend Dr. Benjamin Watson, Philadelphia.

MY DEAR DR. WATSON: Your favor of April 15th is received. Mr. Thompson wrote us soon after the death of Dr. Saul that the money would be paid over in the summer or fall of 1888. Since then, we have written to him twice, but have received no response. I am glad to know that you will look after the matter for us. I will at once write to Mr. Thompson.

Sincerely yours, WILL. S. LANGFORD, *Gen. Sec'y.*

79 The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, 21 to 26 Bible House.

NEW YORK, *May 1st*, 1890.

DEAR DR. WATSON: In reply to your note, I would say no word has been received from Mr. Thompson in reply to my letters of inquiry, and the treasurer has not yet received the money.

Sincerely yours, WM. S. LANGFORD.

(Objected to, as irrelevant.)

5 Q. Have you any other papers relating to the Saul estate?
A. Yes, sir; I have a receipt, which is as follows:

NEW YORK, *June 19th*, 1890.

Received from executors' estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths —.

$15,577.54. GEORGE BLISS, *Treasurer*,
Per E. WALTER ROBERTS,
Ass't Treasurer.

"This will be acknowledged in August Spirit of Missions."

The printed margin or edge is as follows:

"The Domestic and Foreign Missionary Soc'y of Prot. Episcopal Church.

"Stated publications.

"Spirit of Missions, $1.00 a year. The Young Christian Soldier; weekly, single copies, 80 cents; packages of ten or more to one house, 54 cents a year, including postage. Monthly, single copies, 25 cents; packages of ten or more to one house, 16 cents a copy, including postage.

"22 Bible House."

6 Q. When did you receive that receipt and from whom?
80 A. I got it from Mr. Henry C. Thompson himself, I think the next day after it is dated. I think it was Friday that I got it. He wrote me that he was going to New York, I think it was on Thursday, and would be back on Friday, and if I was there he would give me the receipt, which he did.

7 Q. Have you the letter that he wrote you?
A. I have (producing same).

(Said letter offered in evidence by complainant's counsel, and marked "Exhibit L, March 12, 1892.")

(NOTE.)—The original of this paper is returned to the witness and a copy of the same is as follows:

Henry C. Thompson, attorney and counsellor at law, 1001 Chestnut street, Philadelphia.

PHILADELPHIA, *June 19th*, 1890.

MY DEAR DOCTOR: I am going to New York this morning, to settle the Saul matter in full with the board of missions, and also to get their consent to the discharge of the executors. I write to save you trouble of coming down at one o'clock, and also to ask you to call tomorrow morning at one to sign petition for discharge.

Yours truly, H. C. THOMPSON.

8 Q. Did you go down the next day and get that receipt as that letter indicated?
A. I did; yes, sir.

9 Q. Did you sign any petition for discharge?

A. Yes, sir; to the best of my recollection.

10 Q. Are you sure of that?

A. Well, I don't know. I am getting to be an old man and I cannot be sure of anything. My impression is that I signed it. Yes, of course I did.

11 Q. Did you not understand from the society that the amount of that payment was not the full amount?

A. No, sir; I think it says in full.

12 Q. Did you ever see the petition afterwards?

A. I think not.

81 13 Q. Is the paper now produced to you from the papers of Henry C. Thompson the petition that you say you signed on that day?

A. That is my signature. That is so, to the best of my recollection.

(Said petition offered in evidence by counsel for complainants, and marked "Exhibit M, March 12th, 1892.")

Cross-examination.

By Mr. HANNIS:

14 X Q. You and Mr. Thompson were executors appointed under the will of Dr. Saul?

A. Yes, sir.

15 X Q. As between you two, which of you had the custody of the securities and cash of the estate?

A. Mr. Thompson. He had them because he was the business man and had a safe. It was proper, in my judgment at that time, that he should have had them.

16 X Q. You are a clergyman?

A. Yes, sir.

17 X Q. He was the business man, as between you two?

A. Yes, sir.

18 X Q. Had you at any time the custody of any of the securities or any of the cash of the estate?

A. No, sir; except for a moment as it were. I think I took them out of the trunk where he had them and handed them over.

19 X Q. That was at the time when you first began to be executors?

A. Yes, sir.

20 X Q. But after that, he took charge, and when they were turned into cash, he took charge of the cash?

A. Yes, sir.

21 X Q. Had you any knowledge where he kept the cash of this estate or how he kept it?

A. No, sir.

22 X Q. Had you any knowledge at the time he paid this money to the board of foreign and domestic missions that he was paying it with anybody else's money than that of the Saul estate?

82 A. I had not.

23 X Q. Prior to that time, his character had stood well in the community, had it not?

A. Absolutely well, so far as I was informed.

24 X Q. He was considered to be a reputable member of the bar?

A. That was his universal reputation, though I told him he had the reputation of being the most dilatory man at the bar.

Redirect examination.

By Mr. BURTON:

25 Q. How long had you known that he had the reputation of being the most dilatory man at the bar?

A. Not certainly before I became co-executor with him, but when he delayed paying over this money. I would make inquiry about Mr. Thompson's habits and reputation, and I found then that, while he was estimated a thoroughly honest man, he was looked upon as very dilatory—a slow-paced lawyer—which accounted for his delay.

26 Q. The question I ask is when did you first learn or inquire respecting him—how long before he went away—was it a year or two years or how long?

A. Well, I cannot give you a very satisfactory answer about that. Of course, I was led to inquire something about Mr. Thompson's reputation from his slowness in paying this money over; his dilatoriness; his violation of his promises; you see this thing grew upon me. I can hardly tell you when it began, because it grew up. As his character unfolded itself in that respect, I know then I inquired about it, and found that that was his general reputation.

27 Q. When did you first begin making inquiries about him?

A. I don't think I can tell you that. It was certainly subsequent to our rendering the account at court, because I was satisfied that everything was right up to that time. It was only after that when I supposed it would be paid forthwith; it was not, and I made inquiries.

28 Q. You supposed, when the account was filed, that as soon as it would be settled, it would be paid?

83 A. Yes, sir.

29 Q. Did you know when these securities were sold?

A. No; I never knew they were sold.

30 Q. Did you suppose they were on hand at the time of the adjudication of the account?

A. I certainly did. I supposed they were in his safe.

31 Q. And you never knew that they were sold at all, did you, until about the time the money was paid over, or did you know when they were sold at all before that?

A. I didn't know they were sold then.

32 Q. Did you ever ask Mr. Thompson to show you those securities from the time that you handed them over to him until the time this money was paid over?

A. I did.

33 Q. When and how long before?

A. A very few days before the money was paid over.

34 Q. What answer did he give you?

A. That if I came down the next day, he would have the securities here at his office.

35 Q. Do you mean the 19th?

A. Yes, sir; I was to come down the 19th, and he would have the securities—the bonds, as I called them—at his office, No. 1001, and the next morning I got this note that you have just read.

36 Q. Had you never before that asked for these bonds to look at them or see them?

A. No, sir; because I never had any suspicion of his honesty. The bonds were given him to keep until he transferred them as bonds to New York.

37 Q. But you never made any demand upon him positively for the exhibition of those bonds, or the production of them to you, from the time that you handed them over to him until that day?

A. No, sir; not to my recollection. I don't think I did and I don't recollect it.

38 Q. Did you or did you not suppose that you would have to sign the transfer of those securities in any shape or form, as executor?

(Objected to as immaterial.)

84 A. I did not. It didn't come into my mind at all. You will understand that I am not a business man.

39 Q. This letter states on April 15, 1890, as follows:

"Has the treasurer yet received the legacy to the board of the late Dr. Saul? Mr. Thompson, my co-executor, promised me more than two weeks ago, that you should have it this month. Has it reached you? It is no fault of mine that the money was not paid over more than a year ago, and I am disgusted at the shilly-shallying which has deferred it to this late day. I have offered, time and again, to take the whole charge of the business and relieve him of it, but as he is a lawyer and presumably a man of business, I couldn't press him." Did you at the time you wrote that letter understand that the securities had been turned into money?

A. No. When I say money there, it was simply a general term in my mind for money's worth. I meant the bonds.

40 Q. You say in this letter that you had offered time and again to take the whole charge of the business. For how long a time had you been making that offer to him?

A. Every time I saw him, nearly, and he declined.

41 Q. Do you mean from the time of the adjudication?

A. Do you mean when the account was rendered in court? It was soon after that, I suppose.

42 Q. Were you present when the account was settled in court?

A. Yes, sir.

43 Q. Did you or did you not understand from Mr. Thompson that after the confirmation of the account—that is, when the adjudication was filed, unless exceptions were filed to the adjudication

within two or three weeks, the money would be payable forthwith, or that the legacy would be payable forthwith?

A. My understanding was that it would be payable at once; yes, sir. I supposed it was payable at once, of course. I wanted it settled within two or three months afterwards, but, as a lawyer, he said to me, "The judges are not disposed to give us a quittance until within a year," and I supposed he knew more about the law than I did.

44 Q. You were then told that within a year, the account should be settled in the first instance?

85 A. That is what I inferred from what he said.

45 Q. Did you say that to the officers of the Domestic and Foreign Missionary Society in any of your interviews with them?

A. No, sir; I don't think I had any correspondence with them until the end of the year. I was satisfied, from his being a lawyer, with his statement that the judges did not care to release us until the year was out. You see, that is one of the difficulties about a layman in the hands of a lawyer. He may be misled.

Recross-examination.

By Mr. HANNIS:

46 X Q. Look at the certified copy under seal which I now hand you, and state whether that is the adjudication of the court on your account.

A. I am familiar with this. I know that we went to the orphans' court and he presented the account, and then whatever was necessary was done. That is all I can say about that. As long as my name is here, I suppose that I knew what I was about.

47 X Q. This money that was paid by Mr. Thompson to the board of domestic and foreign missions was paid to them in satisfaction of the legacy under the will of Mr. Saul as adjudicated by the orphans' court, was it not?

(Objected to; the record of the case and the receipt shows no satisfaction; opinion of witness objected to; the witness was not present.)

48 X Q. State on what account this money was paid.

(Objection renewed.)

A. I supposed that when the money was paid it was the amount that was adjudged to be due from the estate of Dr. Saul to the board of missions.

49 X Q. That was the money that you were pressing Mr. Thompson to pay?

A. Yes, sir; only I supposed most of it was in bonds. Of course, I didn't suppose that all was, because I knew there was cash somewhere around.

86 By Mr. BURTON:

50 X Q. Had you at any time, in any interview with the board

of domestic missions, referred to this as being in bonds and securities?

A. No, sir.

51 X Q. Not to the society?

A. No, sir; I had no correspondence with them of that character at all.

52 X Q. Nor any conversation with them on that subject?

A. No, sir. I might say that it was agreed between us that the money should be paid—that is, that the bonds themselves should be taken over to New York—that we should not sell them—and delivered there. I think that was Mr. Thompson's own suggestion.

By Mr. HANNIS:

53 X Q. When you had fixed a time to see those bonds, you got the note offered in evidence that he would go over to New York that day and pay the money?

A. Yes, sir. Wednesday, Thursday and Friday were the three days that I have referred to in this connection.

By Mr. BURTON:

54 X Q. You said just now that you had never written to them to inform them of that fact. Please look at the letter of May 29th, which I now hand you, and state whether you did not write to them and tell them that they were in bonds, etc., "For your information, I will say that most of the legacy is in bonds, so that it is accumulating interest to the credit of the legatee." Did you not write that?

A. Of course I wrote it.

55 X Q. That was on the 29th of May, was it not?

A. Yes, sir.

56 X Q. That was your understanding, was it?

A. Yes, sir.

57 X Q. From beginning to end?

A. Yes, sir.

58 X Q. That the estate was maintained in bonds?

A. Yes, sir.

59 X Q. And that the bonds were to be delivered over to the society?

87 A. Yes, sir.

60 X Q. That letter was written in pursuance and in accordance with that understanding, was it not?

A. Yes, sir; certainly. I had nothing else in my mind than that. I don't know when Mr. Thompson first informed them that he was an executor, and about the amount that would come to them. I don't know whether he stated then that it was in bonds or not, but that was the understanding between us. It was more than an understanding. It was at his own suggestion, and I agreed to it. I have not said anything to contradict that.

Adjourned to 11.30 a. m. Saturday, March 19, 1892.

SATURDAY, *March* 19, 1892—11.30 a. m.

Parties met pursuant to adjournment.

Present: Samuel Bell, Esq., examiner; Messrs. Brainerd and Burton for complainant; Mr. Hannis for respondent.

WILLIAM H. PRICE, having been duly sworn, stated:

My residence is 633 Walnut street. My occupation is attorney-at-law and trust officer of the Union Trust Company.

By Mr. BURTON:

1 Q. You were a trust officer in the spring and summer of 1890, were you not?

A. Yes, sir.

2 Q. Do you recollect, and if so, state your recollection in reference to any visit of the complainant, James Holly, to the banking-house of the Union Trust Company in reference to the deposit of the check now produced to you, marked "Complainant's Exhibit A." State your recollection concerning the same.

(Objected to.)

88 A. Mr. Holly, the complainant, called at the office of the Union Trust Company a few days after the disclosures as to Mr. Thompson were made, and produced a check which he had paid to Mr. Thompson. I should say this was the check. It was on the Fidelity Trust Company, I remember. He made some inquiries, I think, as to the balance on hand in our company. At first we declined to give any information in the matter, and he then explained why he wanted the information. He asked, I think, if $12,000 was on deposit at the time. We referred to our books, and found that $12,000 was not on deposit, but that the amount was comparatively small. I think $100 or less. We told him that there was less than $100, or about $100—a small amount. Then inquiry was made, if I remember rightly, as to the payment of a check of Mr. Thompson's, as to what bank it had come through. I think our teller said that he was under the impression it had come through the Bank of North America, but was not positive.

3 Q. Have you fixed the date as near as you can?

A. It was while the matter was still under discussion of Mr. Thompson's misfortune, but how long I do not remember.

4 Q. That is the check that went through your bank (Complainant's Exhibit A)?

A. Yes, sir; that looks like it. It is endorsed for collection in the Union Trust Company.

5 Q. Can you tell from looking at that bank book, Exhibit C, March 12, 1892, what deposit included that check in the Union Trust Company?

(Objected to.)

A. I cannot. I see the check is dated June 19, 1890, and on the 19th of June, 1890, $15,000 was deposited in the Union Trust Company.

6 Q. Would you kindly furnish the deposit ticket, if you have it, on which that deposit was made?

Deposit ticket produced and marked "Complainant's Exhibit 1, March 19, 1892," is as follows:

89 "Deposited in the Union Trust Company, 715, 717, and 719 Chestnut St., Philadelphia, by H. C. Thompson, June 19th, 1890.

	Dollars.	Cts.
Bank notes		
Small notes, 1's and 2's		
Coin		
Checks (enter singly)		
If in the city, name of bank; if out of the city, name of place where payable.		
Jas. Holly (Fidelity)	12,000	
R. E. title	3,000	
Total	$15,000"	

7 Q. Please also make a copy of Mr. Thompson's bank account from the time the balance was struck May 17, 1890, to the closing out of his account, as it appears on your ledger.

(Witness produced copy.)

A. That is a copy of the ledger from May 17, 1890, to the present date.

(The check of $15,577 was paid June 21, 1890, about 12 o'clock.)
(Copy marked "Complainant's Exhibit 2, March 19, 1892.")
(Objected to.)

JOSHUA R. MORGAN, having been duly sworn, was examined as follows:

By Mr. BURTON:

1 Q. You are a member of the Philadelphia bar, and have been so how long?

A. Yes, sir. I have been so since 1884.

2 Q. Do you know Mr. Holly, the complainant?

A. Yes.

3 Q. Were you acquainted with Henry C. Thompson?

90 A. Yes; I was.

4 Q. You heard of the disaster to Mr. Thompson, his attempted suicide?

A. Yes.

5 Q. State whether you had an interview with Mr. Holly soon after that, and how soon after that?

(Objected to.)

A. On July 12, my recollection is, that I heard of the attempt of

the suicide of Mr. Thompson, through an attorney who came on from the city of New York. It might have been that day, Saturday, July 12, but I rather think it was the earlier part of the succeeding week, that I went to see Mr. Holly, and it was then that he informed me that he had no knowledge of Mr. Thompson's condition at that time. It was the first information he had.

6 Q. You gave him the first information respecting Mr. Thompson's attempted suicide that he had?

A. I believe that was the case. That is what Holly said.

7 Q. He appeared to be ignorant of it?

(Objected to.)

A. Yes.

8 Q. What was Mr. Thompson's business?

—. Mr. Thompson was a member of the bar here, and also was a conveyancer. Of course, he transacted that in connection with his business. He represented Mr. Holly in this transaction to do the conveyancing. I refer to the purchase of the property by Mr. Holly from the executors of the estate of Joshua Morgan, deceased, *with* was situated on Fifteenth, north of Wallace, No. 643. The purchase-money was $12,300, $200 of which was paid to the auctioneers at the time of the sale. The sale was the 14th of May, 1890.

9 Q. Who got the deed from you?

(Objected to.)

A. James Holly received the deed from me.

10 Q. Have you knowledge that he placed the deed in the hands of Mr. Thompson in the matter of the conveyance?

A. They told me he had placed it in his hands. Mr. Holly
91 subsequently told me. I could not say Mr. Thompson told me, but from my transactions and relations with him I have no doubt he did.

11 Q. In consequence of what Mr. Holly told you you went to see Thompson about the matter?

A. I could not say whether Mr. Thompson came to see me or I went to see him.

12 Q. You had conferences with him at different times?

A. Yes; I spoke to him frequently about it.

13 Q. You recognized him as acting for Mr. Holly?

A. Yes; unquestionably.

By Mr. BRAINERD:

14 Q. Did you communicate with any other lawyer in regard to the matter as respecting Mr. Holly?

A. Up to the time of this attempted suicide?

15 Q. Yes.

A. I did not. Except Mr. Thompson's son, I think, called to see me once. I understood, and I think he told me that he was acting for his father in the matter. That was previous to the attempted suicide in New York city, or Jersey City, or wherever it was.

By Mr. BURTON:

16 Q. Had you any personal interviews with Mr. Holly prior to the time when you called upon him after Mr. Thompson's trouble?

(Objected to.)

A. Yes; I had.

17 Q. How often had you interviews?

A. I met him several times. I could not say exactly how often. It was more than once, though.

18 Q. What progress had been made by Mr. Thompson in the preparation of the papers for the conveyance at the time of this trouble?

(Objected to.)

A. So far as I know, none at all.

19 Q. Had he paid you the $12,000 that was deposited with him by Holly?

(Objected to.)

A. He had not, or any part of it.

92 20 Q. Did you inform Mr. Holly at this interview after his trouble on that point?

(Objected to.)

A. I did.

21 Q. What did you tell him?

A. I told him that Mr. Thompson had not paid any of it to us as executors—that is, my uncle and myself, as executors under the will of my deceased uncle.

By Mr. BRAINERD:

22 Q. When you say you gave the deed to Mr. Holly you mean you gave to him the deed under which the vendor held the title?

A. Yes; I gave him the deed from the grantor to the decedent, from whom he purchased the property.

By Mr. HANNIS:

23 Q. The evidence of the vendor's title?

A. Yes.

By Mr. BURTON:

24 Q. Was it at the time of that interview that he told you he had paid him $12,000?

A. Yes; $12,100. He showed me the receipt. The property sold for $12,300, and he paid $200 down. Mr. Holly showed me the receipt for the amount he paid Mr. Thompson.

25 Q. Is that the receipt that he showed you? (Complainant's Exhibit B, March 12, 1892.)

(Objected to.)

A. Yes; my recollection is that that is the receipt.

26 Q. Had you furnished him with a certified copy of the letters testamentary?

(Objected to.)

A. Yes.

27 Q. Of Morgan's estate?

A. Yes.

28 Q. On what date did you furnish him that?

(Objected to.)

A. I have a copy of the letter which I wrote to him,
93 which bears date of June 4, 1890, and I suppose it was sent to him at that time.

29 Q. Had Mr. Thompson prepared and tendered you a deed or any paper for the signatures?

(Objected to.)

A. No; he had not. On several occasions I spoke to him, and I remember once on Chestnut street, between Seventh and Eighth, on the south side of the way, I stopped him as he was going east on Chestnut street and I west, and I said something to him about it, and he said, "Oh, that matter is all right now; Holly has deposited the money." He did not say where, or anything of that kind. I went on.

30 Q. You attended principally to this business on behalf of the estate, did you not?

A. Yes; on behalf of the estate of Joshua Morgan, deceased. I was one of the executors. The other one was my uncle, who was an aged man, residing out of the city.

31 Q. You had the principal management of it?

A. Yes; and I subsequently settled the matter with Mr. Holly, he paying the consideration money. I think it was some time in August or the first week in September.

(Subject to the foregoing objections, Mr. Hannis cross-examined the witness as follows:)

32 X Q. The price, you say, was $12,300?

A. Yes.

33 X Q. If, as stated here, but $200 was paid at the auction and $12,000 deposited with Mr. Thompson, that would be $100 short of meeting the purchase-money, would it not?

A. Yes.

34 X Q. You say Mr. Holly afterwards settled with you for this property?

A. He afterwards paid the consideration money of $12,100. He showed me a receipt for $200.

94 JAMES HOLLY recalled.

By Mr. BURTON:

70 Q. Why was it that you only paid Mr. Thompson $12,000 for the purchase of this property?

(Objected to.)

A. That is all he asked me to do. He filled up a check for $12,000.

71 Q. And you gave it accordingly?

A. Yes.

By Mr. HANNIS:

72 Q. How did you expect Mr. Thompson to pay $12,100, which was the balance then due, out of $12,000 which you paid him?

A. I did not suppose this was settling the thing. I supposed this was paying him what he asked me, and I would pay the balance afterwards when we were settling the account. That is just what he asked he for, and I gave him a check and he filled it up for that amount.

By Mr. BURTON:

73 Q. In your knowledge of the conveyancing there are taxes and other bills to be apportioned, are there not, an- interest on mortgage, which make up a question of a few dollars and cents in the settlement, one way or the other, which cannot be ascertained until the title is passed?

(Objected to.)

A. Certainly. I always understand buying property that way; there is always water rent, taxes and things of that kind to be paid.

74 Q. And the policy of insurance, all to be accounted for at the time of the settlement.

A. Certainly. I have always understood that in buying property.

By Mr. HANNIS:

75 Q. Which is just as likely to increase the amount to be paid as lessen it?

A. In some cases it does. In some it diminishes and some increases.

95 76 Q. That is to say, if the previous owner of the property has paid the water rent and taxes for the year you will have to reimburse him?

A. I have to pay him the balance, whatever it is.

By Mr. BURTON:

77 Q. If it is not paid, he has to pay you?

A. Yes.

HENRY C. THOMPSON, JR., recalled.

By Mr. BURTON:

97 Q. Look at the bills now produced to you and say whether they were not the statements rendered by Henry C. Thompson in the matter of the purchase of 1221 Walnut street by Mr. Holly?

(Objected to.)

A. They are in Mr. Thompson's handwriting entirely, and purport to be a settlement between Elwood Wilson, Jr., and James Holly for sale and purchase of premises, 1221 Walnut street. One paper is a statement of the real-estate settlement between Wilson and Holly, with the usual adjustment of mortgage, taxes, water rents, city claims, gas bill and auctioneer, such as is the custom in an ordinary real-estate settlement. The other paper is a statement of account between Mr. Holly and Mr. Thompson, including the charge for services, moneys received and paid out. They are both in Mr. Thompson's handwriting. It is the ordinary real-estate settlement.

(Complainant's Exhibits 3 and 4, March 19, 1892.)

98 Q. You wrote a letter to Mr. Holly?

A. No; I do not recollect writing a letter, but I recall an interview, whether there was one or more I do not know, but I recall an interview with Mr. Holly in which I told him that the money paid Mr. Thompson by him for the purchase of the house on Fifteenth street was not paid into the title company. When I first learned from Mr. Holly that the money had been paid Mr. Thompson I thought it possible, while not probable, that it might have been deposited in the title company. I subsequently ascertained
96 that was not the fact. I presume I wrote him a letter informing him of it. I know I told him personally.

(The foregoing answer objected to.)

99 Q. You afterwards attended to the conveyancing, and wrote the deeds for Mr. Holly after this occurrence of Mr. Thompson?

(Objected to.)

A. Yes, sir; I wrote the deeds out on request of Mr. Burton. Mr. Holly called, I think, with Mr. Burton or Mr. Morgan; anyhow, Mr. Holly called, and he asked me if I could not do something towards raising the money to help him complete his purchase. I told him that was out of the question; that I did not have a dollar, and I saw no way or means by which I could help him out of his trouble. Then Mr. Burton asked me if I would not write the deed to save Mr. Holly that expense, and I said I would do so cheerfully. I wrote a deed conveying the premises and a deed of confirmation for the Morgan heirs to sign. There were a large number of them. Then Mr. Burton or Mr. Holly, somebody asked me if I would not pay the title company's due bill of $18 or thereabouts for insuring the title, and I promised that I would, and did. That was my connection with the writing of the deeds.

(Foregoing answer objected to.)

100 Q. As assignee for the benefit of creditors of Henry C. Thompson, you have had an opportunity of examining his books and accounts for the past few years?

A. Yes.

101 Q. For how long a time, from that examination and your knowledge, was Mr. Thompson actually insolvent?

(Objected to.)

A. I cannot answer that question. I never examined the books with reference to finding out the particular times when his assets would not meet his liabilities, for the reason that I could never find from his books an exact statement of what his liabilities were, and I know that he had been disposing of his assets since 1882, when I had any knowledge of it. One year he sold some $200,00 or $25,000 worth of real estate that I know of; and he was rapidly converting
97 all his property into cash as quickly as he could and paying whatever claims he could with it. It would be almost impossible for me, and I take it for any book-keeper to take Mr. Thompson's books, without a starting point, and say when his debts exceeded his assets. I do not think it is possible. Some of the accounts show no posting in the ledgers since 1880. Members of his family used money that he had. He was very loose in keeping accurate accounts with them. I have been informed by other members of the family that Mr. Thompson had money of theirs, which they were unable to get, running back possibly twenty years. That could not have been on account of his inability to pay it, because I know that the claims that they had against him could have been more than paid by the sale of one or two particular pieces of real estate. For some reason or other he stood them off.

102 Q. What was the amount of his liabilities at the time of his going away, as near as you have ascertained since that time?

(Objected to.)

A. I have never figured them up.

103 Q. I mean approximately.

A. I should say $100,000.

104 Q. That state of affairs in which he went away, had that not existed at least one or two years, though not known?

(Objected to.)

A. Yes, sir; there is no question about that.

105 Q. Nobody was aware of the fact?

A. No, sir; nobody that I know of. I did not know of it.

106 Q. What was the gross amount of assets that you discovered to belong to Mr. Thompson at the time that he went away?

(Objected to.)

A. About $2,500, which is now on deposit to my credit as assignee, in the Trust Company of North America, it not having been checked against.

By Mr. BRAINERD:

107 Q. And that is all you have been able to realize as assignee?

98 A. Yes, sir.

108 Q. Are there any assets remaining in your hands no yet converted into cash?

A. Not that I know of; no, sir. The mental condition of Mr Thompson has been such that I have been unable to obtain any information from him.

109 Q. You have not got anything other than the $2,500.

A. No, sir; but I have not given up all hope yet, though practically given up. If I might get an intelligent talk with him I could be able to find out something, but that is very problematical.

110 Q. That embraces everything of which you have any knowledge?

A. Yes, sir.

By Mr. BURTON:

111 Q. The bill charges that Thompson has absconded from his last known residence and gone to parts unknown, and cannot now be served with process. That is at the time the bill was filed. What about that? Is not that true? Were his whereabouts known?

A. His whereabouts have not been known since July, 1890.

Cross-examination.

By Mr. HANNIS:

112 X Q. Mr. Thompson was comparatively, apparently, a prosperous business man, doing a large business in his profession, was he not?

A. Yes, sir; I always considered him so.

113 X Q. Up to the time this disaster occurred?

A. Yes, sir.

114 X Q. The volume I hand you is a digest of the statutes of Pennsylvania, is it not?

A. Yes; it is.

115 X Q. Will you look at the digest of the statute of 24th March, 1818, section 5, and read that section?

A. (Reading:) "All assignments so as aforesaid to be made and executed which shall not be recorded in the office for recording
deeds in the county in which said assignor resides within
99 thirty days after the execution thereof shall be considered
null and void as against any of the creditors of the said assignor."

The assignment from Henry C. Thompson to myself was not had and executed for the purpose of collecting anything under the same but was for the purpose of preventing suits and statements of facts being filed against him. That was the object of the assignment. The questions of residence, domicile and laws in different States were not considered by me when the assignment was prepared and recorded.

116 X Q. But as a matter of law, under the Pennsylvania statute if it had not been recorded in the county where the assignor resided

within thirty days after its date it would have been null and void as to creditors, would it not?

(Objected to as immaterial to this controversy as matter of fact, and as a matter of law the question cannot be raised in collateral proceeding, and the statute speaks for itself.)

A. So the statute I have just read reads.

Redirect examination.

By Mr. BURTON:

117 Q. How long have you been practicing in the courts of Philadelphia?

A. Since July, 1885.

118 Q. Do you know the rules and practice of the orphans' court with respect to the filing of adjudications by the judges of the court on settlement of the account of an executor or administrator?

A. I think I do.

119 Q. When an adjudication has been filed by an auditing judge, as was done in the estate of James Saul, deceased, how long after the filing of that adjudication would that adjudication be confirmed absolutely by the court, if no exceptions to the adjudication had previously been filed thereto?

(Objected to, first, because the rules of court must be produced and identified by the witness, and second, the production of the record of Saul's estate will show the precise date of the confirmation *nisi*, and the confirmation absolutely of the adjudication of the account.)

A. Three weeks.

100 120 Q. Not over three weeks, is it?

A. No, sir. Three weeks after an adjudication is confirmed *nisi* it is confirmed absolutely, unless exceptions are filed in the meantime.

121 Q. Is not that what is termed the third Saturday after the filing of the adjudication?

A. Yes.

122 Q. Is not the amount of the balance on hand as awarded by the adjudication then payable by the executor to the distributees?

(Objected to.)

A. Yes, sir.

123 Q. And if that is not paid forthwith, cannot payment be enforced by process of attachment for contempt against the executor for non-payment?

(Objected to.)

A. No, sir; not by attachment. The practice is to petition for a rule to show cause why an attachment should not issue. Then, upon hearing of that petition, and answer thereto, if no satisfactory reason is given why the money is not paid, an attachment is ordered to go out against the party for contempt.

124 Q. And under that, if proceeding had been taken, and he had given no satisfactory reason, Mr. Thompson would have been attached for contempt in due time?

(Objected to.)

A. Yes.

125 Q. Do you know of any other person having collected any property of Mr. Thompson's, or any money belonging to him since the assignment was made to you for the benefit of creditors?

(Objected to.)

A. No; if I did I would be after it.

By Mr. BRAINERD:

126 Q. No other person than yourself, so far as you know, had charge of his business?

A. No, sir. Nor received a dollar that belonged to the assigned estate.

101 By Mr. BURTON:

127 Q. Mr. Thompson owned property in New Jersey, did he not?

(Objected to.)

A. Yes.

128 Q. What was the condition of that property as to incumbrances?

(Objected to.)

A. He owned a residence property and a large boarding-house or hotel, and some vacant land, all of which was covered with mortgages exceeding their value.

129 Q. Was there a mortgage given to the Real Estate Title Company of that property previously to this?

(Objected to.)

A. Yes, sir.

130 Q. For how much?

A. $15,000.

131 Q. Do you know about what time it was given?

A. I think it was given in June of 1890.

(Complainant's counsel offered in evidence copy of letter from Julien T. Davies to Messrs. Hannis, Parrish & Williams furnished to complainants by Messrs. Hannis, Parrish & Williams about the time it was dated, November 13, 1890.)

(Objected to as irrelevant.)

It is admitted that the above referred to is a copy of the letter.

(Copy marked "Complainant's Exhibit No. 5, March 19, 1892.")

JOSEPH SEBLEY, having been duly sworn, was examined as follows:

By Mr. BURTON:

1 Q. What position do you occupy?

A. I am custodian of the records of the orphans' court of Philadelphia county.

102 2 Q. Have you with you the record of the proceedings in the estate of Joshua Morgan, deceased?

A. Yes, sir.

3 Q. Among those records do you find a petition for the confirmation of the sale to James Holly?

(Objected to as irrelevant.)

A. Yes, sir. And the decree.

(Records produced.)

The date on which the petition was sworn to is the 12th day of June, 1890, and the decree entered thereon was made July 12, 1890.

4 Q. When was the acceptance of service dated?

A. June 28, 1890, the last Saturday.

5 Q. That is signed by Henry C. Thompson, attorney for James Holly?

A. Yes, sir.

(All the references to the Morgan proceedings in the orphans' court are objected to.)

6 Q. When was the adjudication filed in the estate of James Saul, deceased?

(Objected to, as the record itself is the best evidence.)

A. November 5, 1889. It was confirmed *nisi*.

(Complainant's counsel offered in evidence certified copy of the attachment proceedings, June term, 1890, C. P. No. 4, No. 764.)

Adjourned until Saturday, April 9, 1892, at 11.30 a. m.

SATURDAY, *April* 23, 1892—11.30 a. m.

Present: Samuel Bell, Esq., examiner; Messrs. Burton and Hannis, of counsel.

JOSEPH MASON, having been duly sworn, was examined as follows:

By Mr. BURTON:

1 Q. State your name, age, residence and occupation.

A. My name is Joseph Mason; my age is forty-six; I reside 4109 Walnut street; my occupation is trust officer of the Real Estate Title Insurance and Trust Company of Philadelphia.

103 2 Q. How long have you been in that capacity?

A. Since the 4th of March, 1886. I have been connected with the company since that time.

3 Q. Did you know Mr. Holly, the plaintiff in this case?

A. I did not. I am not acquainted with him now.

4 Q. Have you any acquaintance with the Domestic and Foreign Missionary Society?

A. No, sir. I know neither of the parties in this case.

5 Q. Do you know, and if so, how long have you known Henry C. Thompson?

A. I have known Henry C. Thompson since 1863.

6 Q. Where does he reside?

A. I do not know where he resides at the present time.

7 Q. Was he connected with the Real Estate Title Company while you were there, and if so, in what capacity?

A. He was. He was the solicitor. He was solicitor of the company during the time I have been there. When he first went there I cannot say. He was solicitor when I went there. He continued in that relationship until the latter part of June or beginning of July, 1890.

8 Q. What was his special relation to the company? What was his special department?

(Objected to as irrelevant.)

A. He was the legal advisor of the company.

9 Q. Were the moneys entrusted to him for settlement and things of that kind of the company during that time?

A. I suppose there have been. I do not know that it was necessarily a part of his duty.

10 Q. Was not that the practice, to entrust him with money occasionally?

A. I cannot say that it was in any general sense such as you ask it.

11 Q. There were instances in which that was done, were there not?

A. Yes, sir; I suppose there were.

12 Q. He was also a conveyancer by occupation?

A. He was a member of the bar.

104 13 Q. Did you know him as having part of his business relating to conveyancing and real-estate transactions?

A. I suppose that he attended to, in fact, I know that he attended to matters in which conveyancing was involved.

14 Q. On his own account as well as that of the company?

A. I think he did. I do not recall any special instance.

15 Q. You were subpœnaed to produce a bond and mortgage given by Henry C. Thompson to the Real Estate Title Company, were you not?

A. I was.

16 Q. Will you please produce them?

A. In the first place, I want to say that the papers referred to were not in my custody as trust officer, but were in charge of the

secretary and treasurer. I requested him to give me the bond and mortgage referred to, and thereupon he informed me that he had made diligent search and could not find them among the papers of the company.

17 Q. Did he inform you where they were?

A. He could not say where they were, but his presumption was that they were in the hands of counsel in New Jersey who had brought suit for the company on the mortgage.

18 Q. Do you remember what the date of the mortgage was?

A. I do not.

19 Q. Could you by looking at a certificate of the record of the mortgage identify the mortgage?

A. No; I could not identify it with any very positive knowledge that I have on the subject.

20 Q. Did you ever see the bond and mortgage?

A. Yes, sir; I saw the bond and probably the mortgage.

21 Q. You have not stated when Mr. Thompson left the employ of the institution?

A. I said the latter part of June or early part of July, 1890.

22 Q. Prior to that time was this mortgage executed?

(Objected to as irrelevant.)

A. Yes, sir.

23 Q. Do you remember how long prior?

105 A. I cannot say. Probably a week or about that time. Maybe longer.

24 Q. Do you know, from anything that occurred at that time, whether he was in financial difficulties at the time this mortgage was given? Have you any knowledge on that subject?

(Objected to.)

A. I only know that it was discovered that the company, through his agency or otherwise, had been appointed trustee in one estate, and that the fact of such appointment, although known to him, had not been communicated to the company, and the parties interested having mentioned the matter to one of the directors, he made inquiry in regard to the existence of the trust, and was informed that our books did not disclose any such trust. I was informed this; I do not know this, as I was not present at the time, was communicated to Mr. Thompson, and he admitted the facts, but stated that the estate would be made whole, that securities would be furnished. I had no interview with him in regard to these matters, and therefore what I say is hearsay.

25 Q. Was it from other officers of the company that you were informed?

A. Yes, sir.

26 Q. You had no conversation with Mr. Thompson himself on the subject?

A. I had not.

27 Q. Was the company involved by reason of this transaction in any way?

(Objected to as irrelevant.)

A. It was not known to what extent the company might be chargeable with the trust, but that and some other matters were discovered on which it was assumed that the company might be liable, and it proved subsequently that the company did become liable, or that their liability was so likely to be established that it was not worth while to deny it.

28 Q. Was it on account of these liabilities that this mortgage was taken from Mr. Thompson?

(Objected to as irrelevant.)

A. So I was informed.

106 29 Q. Did the liabilities extend to the consideration money named in the mortgage, about $15,000?

A. I think that they probably exceeded $15,000.

30 Q. Had the moneys been received by Mr. Thompson?

(Objected to as irrelevant)

A. I cannot say as to that.

31 Q. According to what you were informed by the other directors and officers of the company, had the money been in his hands?

A. I learned more of the matter subsequently. I am speaking as of the time when this occurred. We were informed subsequently, if not at the time, that these moneys had been received by Mr. Thompson in such a way as to make the company liable.

32 Q. Can you remember at least how long a time it was before the giving of this mortgage and bond that the matter was known to the company, and considered by them previous to taking the mortgage?

A. I cannot say. It was very shortly before. I cannot say how long.

33 Q. Was it a week?

A. I should say not more than a week. I am not at all positive on that subject.

34 Q. You have no way of fixing the date of that mortgage, when it was given, so far as your knowledge is concerned?

A. Not with certainty. I expected to have at least the bond and produce that.

35 Q. As near as you can recollect from your examination, can you by refreshing your recollection fix about the date?

A. I do not think I have any recollection on the subject at all as to the exact date.

36 Q. Have you anything in your books which were kept under your eye?

A. No; there is nothing in any books that I had charge of on which the date would appear.

37 Q. Were you informed anything about this matter of Saul's estate prior to the time of his going away?

(Objected to as irrelevant.)

107 A. I think I only knew that he was an executor of the estate of a man by the name of Saul, who, if I am not mistaken, was said to be an Episcopal minister, who died in a hospital in Philadelphia. Beyond that I do not think I knew anything about the matter.

38 Q. Did the Rev. Dr. Watson ever call upon you in reference to the matter of Saul's estate?

(Objected to as irrelevant.)

A. I do not think he did.

39 Q. Had you any knowledge, and, if so, state what it was, respecting Mr. Thompson's insolvency prior to the time when this matter was brought to the attention of the company?

A. I cannot say that I had any knowledge at all of his insolvency.

40 Q. Had you any knowledge of his being in financial difficulties prior to that time?

(Objected to as irrelevant.)

41 Q. I do not think I had. I supposed he was in comfortable circumstances financially up to the time of these discoveries.

42 Q. You said that some one came and brought you the information about this matter in which you were involved?

A. I was informed that such report had been made to the president and he mentioned the matter.

43 Q. Will you produce the bond hereafter, or will you enable us to fix the date of the execution of the bond and mortgage?

A. As I am an officer of the company, I can only say I will do whatever I am legally required to do. I do not know that I could do anything more. I do not think I have any right to do anything more.

44 Q. Is not the date of this bond and mortgage easily come-atable?

A. I think so.

45 Q. Kindly furnish us with that date?

A. I think the 23d of June, 1890, is probably the date when the bond and mortgage was executed. Of my own knowledge and recollection I cannot say certainly.

46 Q. Do you know or do you remember for how long a
108 time that trust had been made or the company been appointed trustee?

(Objected to as irrelevant.)

A. I cannot say accurately. Probably six months or possibly a year before.

47 Q. Six months or possibly a year before the company had been appointed trustee you had no knowledge of it from the books of the company?

A. Yes, sir; I think an account of former trustees had been adjudicated and award made to the company as successors probably within six months.

48 Q. Do you remember what estate they had?
A. I think it was the estate of Edward Gorgas, deceased.

(Mr. Hannis objects to all the foregoing testimony as irrelevant, and declines to cross-examine.)

CRAIG D. RITCHIE, having been duly affirmed, was examined as follows:

By Mr. BURTON:

1 Q. What is your name, age, residence and occupation?
A. My name is Craig D. Ritchie; I will be sixty-two next Tuesday; my residence is northwest corner of Thirty-fourth and Hamilton streets; my occupation is conveyancer.
2 Q. What was your occupation in June and July, 1890?
A. I was president of the Real Estate Title Company, at the northwest corner of Tenth and Chestnut streets.
3 Q. How long had you been in that capacity?
A. I have been with the company from its formation, in March, 1876, down to May, 1891, when I resigned the office of the president, and January 1, 1892, when I resigned all connection with the company except as director.
4 Q. Did you know Henry C. Thompson?
A. I did.
5 Q. What was his relation to the company during the time you were with it?
A. Part of the time he was a director in the company and part of the time he was a solicitor for the company.
109 6 Q. What time was he solicitor for the company?
A. I cannot fix the date.
7 Q. The latter part or the first part of the time?
A. The latter part of the time.
8 Q. How long was he solicitor for the company, as near as you can recollect?
A. I cannot remember. Four or five years probably.
9 Q. When did he cease to be solicitor?
A. I cannot give you the exact date, but I dismissed him from his office of solicitor, I think it was in June, 1890. He had previously, some time in April or May of 1890, tendered his resignation to the board as solicitor, which had not been formally acted upon, because there was a question as to who should be his successor.
10 Q. Do you know what was the occasion of his tendering his resignation in the first instance?

(Objected to as irrelevant.)

A. As far as I know, it was this. He stated his desire to go back into the board as a director, and succeeded by the accumulative system of voting, which that company, as all new companies, is subject to, in electing himself, and then the question arose as to whether a director could be a salaried officer, except in the case of the president, and he said he would tender his resignation and end

that question. That was the only reason, so far as I know, that was given either to myself or to any other person.

11 Q. Had you any knowledge of his being in financial difficulties at that time?

A. No, sir.

12 Q. You knew of his giving the bond and mortgage, to which reference has been made by Mr. Mason, for $15,000 to the Real Estate Title Company?

A. I did.

13 Q. Do you know the occasion of that?

A. Yes, sir.

14 Q. Please state it.

(Objected to, as irrelevant.)

A. I became acquainted with the fact that Mr. Thompson had caused our company to be appointed trustee in an estate,
110 and had receipted as solicitor to the prior executors and trustees of the same estate for a considerable sum of money, and had not informed the company or any of its officers of the fact of the appointment of the company as such trustee. When that was discovered I charged him with the occurrence and asked him if I had been properly informed. He stated that what I said was correct. I then asked him where the money was. He said it was in his possession. I then asked him to pay it over to the treasurer or trust officer of the company at once. He said it was not then convenient to do it. He could make arrangements to pay it over shortly, but he could not do it immediately. I told him I must have security for it, and he then agreed to give the bond and mortgage in question to secure the company from that loss, if he did not pay it over, or from any other loss which might happen, because I further asked him if there were and other transactions of a similar character by which the company might be involved, and though he did not explicitly admit the same, neither did he explicitly deny it, but he said he could give ample security to protect everything which he would do. He wrote the bond and mortgage himself, and recorded it himself.

15 Q. How long did this disclosure happen before the bond and mortgage was executed?

(Objected to as irrelevant.)

A. That I cannot say. When this matter came out and he offered this security, this bond and mortgage, I asked him how soon he would prepare it, and he said he would prepare it immediately. He had all the title papers of his property and he went on and wrote it, I imagine, about as soon as it could be done. I do not think there was any unnecessary delay about it.

16 Q. You do not remember whether it was a day or a week or two weeks?

A. It was not a day and it certainly was not two weeks, and I do not think it was one week.

17 Q. Not over a week?

A. No; I do not think it was as much as a week. I think
111 probably it was within two or three days. I know it was done quickly, but the exact date I do not recollect.

18 Q. You demanded the money of him immediately, as soon as you found out he had received it?

A. As soon as he admitted he had received these moneys, my question was, "Where is that money?" He said, "It is in my hands." I said, "I will then have to demand that you," or require, I do not remember the exact words, demand or require, "that you make payment or secure at once to our trust officer or treasurer."

19 Q. Then he informed you that he had not it?

A. He said it was not then convenient to pay it. He could not pay it then, but he could pay it within a few months, or shortly, or some expression of that kind, leading me to think it was merely a matter not of a difficulty with him, but he simply did not have that much ready cash on hand and would have to turn something.

20 Q. He admitted to you he had made use of the money?

A. No; he did not admit that. He simply said it was in his hands.

21 Q. Did you not ask him why he could not turn it over if it was in his hands?

(Objected to.)

A. That I do not remember. I followed it up when he said it was in his hands by saying that he should pay it, to which he replied he could not then do so.

22 Q. Did you not understand by that that he had made use of the money?

(Objected to.)

A. I so believed at the time.

23 Q. You really so understood it, did you not?

A. I really understood if a man had money in his hands and could not pay it he had made use of it. I did not follow it up and ask what he did with it. I went to the next point. "How are you going to secure us? If you can pay us in three months, where is our security in the meantime?" He says, "I will give you a mortgage."

24 Q. How soon after that did you discover the extent of his defalcation when you dismissed him?

112 A. I dismissed him immediately on the day he admitted this. I said, "Your resignation, which has been lying on the table a month or six weeks, I take the authority, on behalf of the board, to accept that resignation, and I desire you to leave the office immediately." He said he would go as soon as he could get his books and papers moved.

25 Q. Can you not fix the date when that was said to him?

A. I cannot.

26 Q. By reference to the books of the company?

A. I might, by reference to some of the minute books or something. It was in the end of June.

27 Q. This mortgage is dated the 23rd of June. Was this before the mortgage was given or afterwards?

A. This was a few days before. I dismissed him on the same day that he offered to give the mortgage.

28 Q. Could you not find from the books of the company the exact date when that dismissal took place?

A. That I do not know. I kept no minutes of the transaction.

29 Q. You kept no memorandum yourself?

A. No, sir.

30 Q. What minute books would show that transaction? Is there not a minute book of the secretary?

A. Yes, sir. But it was no meeting of the company. I simply acted as the president.

31 Q. Did you make any report of that to the officers, or to the company?

A. I reported, of course, to the board.

32 Q. When did they have their meeting?

A. That I cannot tell you. We had some committee meetings, because I called the committee together.

33 Q. What committee was that?

A. It was a special committee on the business of the office. I do not know that it had any particular name.

34 Q. Who were the members of that committee?

A. Mr. Carson was one, and Mr. Lukens was one. I do not really recollect who the others were.

35 Q. Did that committee keep minutes?

A. They sometimes did and sometimes did not.

113 36 Q. You do not know whether they could refer to them or not?

A. I do not.

37 Q. You are still a director of the company?

A. Yes, sir.

38 Q. Could you not, by going to the office of the company, enable us to fix the date?

A. Possibly. I won't say for certain. He was dismissed. In fact, it was an acceptance of his resignation which had been tendered some time ago.

39 Q. Who was it that gave you the information that led you to this examination?

A. Charles M. Lukens.

40 Q. He gave you the information on which you had the interview with Mr. Thompson?

A. Yes, sir.

41 Q. You do not remember how long before this mortgage was made this information was given to you?

A. Mr. Lukens one day in conversation stated that he was glad to learn that the company was trustee for an old friend of his, some lady, whose name I have forgotten. I said, "We are always glad to be trustees for any decent people, and friends of yours, etc., but I did not know that we were." I do not know her by name at all. He said, "She told me you were." I said, "I will look at the list

of trusts, which is kept by our trust officer, and soon tell you whether we are or not." I thought I would have recognized the name when he mentioned it. In looking at the list I did not find the name, and I said, "I guess she has made a mistake. I do not see her on our list of trusts, and she has probably confused us with the Real Estate Trust Company up Chestnut street." He was in some little time afterwards, and he said he had met the lady again, and she said, "No, it was the company at Tenth and Chestnut streets, and he was a director." I said, "It is very strange that we have not any record of it. I will send to the orphans' court and see about it." The examination at the orphans' court developed these circumstances. We did not suppose there was anything wrong. We thought there was some blunder of some kind or another.

That developed this matter, and immediately upon obtain-
114 ing the information I called Mr. Thompson to an upper room, and also called one or two of the directors who happened to be get-at-able, to hear what he said when I taxed him with it. The directors sat still and did not say anything. I stated the facts as I had them from the orphans' court. I do not know whether it was Mr. Mason or one of our clerks who made the examination. I did not make it myself. Not having made it myself, I thought it best to state the facts to Mr. Thompson and ask him whether they were correct. He at once, without any evidence of fear or trouble or anything else, said, "That is entirely correct. The company is trustee. I had them appointed." I said, "Mr. Thompson, where is the money?" He said, "In my hands." Then I said, "All I can do is to ask you to pay it over," or "demand," or "require" "you to pay it over to our treasurer or trust officer, as we are responsible for it." He says, "I cannot pay it now. I can pay it in a short time, a few months." Some phrase of that kind. I said, "We want security for it." Then I said, "Are there any other things of this kind?" To which, as I said before, he did not explicitly admit or explicitly deny. Then I said, "Will you give me the papers to have the mortgage prepared?" He said, "I will write it myself." I think he went to writing it probably within an hour afterwards. He was as cool as a cucumber about it. As soon as we got downstairs I said, "Mr. Thompson, this is so irregular there is nothing left for me to do except to say I take the authority of accepting your resignation that was tendered some four or six weeks ago, and to say to you you will have to remove your office from this building." He said, "I have been thinking of going down with my son Harry, and as soon as I can get my books and papers moved away I will do so. I have been intending to do it."

42 Q. Who were the other directors who were present at this interview?

A. Mr. Lukens and Mr. Carson.

43 Q. Had you any knowledge of Mr. Thompson being one of the executors of Saul's estate?

(Objected to as irrelevant.)

A. I think I had heard him say some time before, maybe a year

or two, that he had been made executor of some Episcopal
115 clergyman who had died in some hospital, but I do not know whether I knew the name until afterwards, or if I did I had entirely forgotten it. I had no knowledge of the parties in any way.

44 Q. Dr. Watson, or no one on behalf of the society defendant, ever called upon you in reference to it, did they?

A. No one on behalf of that estate, or anybody interested, ever called on me, and I never exchanged a word with Dr. Watson on that or any other subject in my life.

45 Q. You afterwards found that Mr. Thompson had been in quite a number of other transactions in which the company was concerned, did you not, and they were the sufferers to a certain extent?

(Objected to as irrelevant.)

A. After Mr. Thompson attempted to commit suicide we became satisfied that he had been doing things which he ought not have done, and our examinations discovered that he had been using the credit of the company, or at least involving the company in some matters which we were afterwards obliged to make good.

(Mr. Hannis objects to all the foregoing testimony as irrelevant and declines to cross-examine.)

(Mr. Ritchie desires to make a statement.)

Mr. RITCHIE: From what was said by Mr. Mason in his examination, which I heard, Mr. Mason seems to be doubtful as to the question whether settlement money came into Mr. Thompson's hands or not. I desire to say that Mr. Thompson had been frequently and repeatedly ordered by me never to interfere in any settlement transaction, or to touch any of the moneys in those matters. This was not because of any doubt entertained by me as to Mr. Thompson's absolute honesty, or as to his financial ability to make good any mistake which he might have made, but because there were proper clerks employed for that purpose, and Mr. Thompson's way of doing business, making loose memorandum and incomplete memorandum, did not satisfy me, and when, after those orders, I detected, not many times, but several times, that Mr. Thompson had been meddling with settlements, I called him
116 to account therefor, and he plead in every case that one of the parties to the transaction was an old client of his and had specially requested that he would oversee the settlements. To which, of course, I had no reason to deny credence, and had to admit that in a case where he had been especially requested by a client to make settlement I could not well interpose an absolute objection.

But in no way by reason of his connection with the company had he any right whatever to touch in any way, shape or form any moneys coming into the settlement department or into any other department, except such as might be paid to him in his legal capacity as solicitor of the company.

By Mr. BURTON:

45 Q. How long prior to the execution of this mortgage those orders given to him about the money?

A. Years before.

47 Q. And yet under your investigations you found that he handled a good deal of money of the company, did you not?

A. No; we did not find a great loss——

48 Q. The question was whether he had not handled the money the company in various transactions?

A. He had handled it in more or less transactions, not very in number, but in every case he had plead that his reason doing was the request of clients of his who were doing business the company who desired his personal superintendence.

49 Q. In none of these cases were there any losses to the

(Objected to as irrelevant.)

A. Yes, sir; in some of these cases there were losses.

50 Q. It turned out that he had received the money and put his own use. Is not that so?

A. He had received money, which money disappeared.

By Mr. HANNIS:

51 Q. That was not developed until after he left you?

A. Oh, no; not at all. At the time when this mortgage given and this charge was made of the reception of the trust out notice to the company. I was under the impression

117 Thompson was a man worth from $50,000 to $60,000, and until he ran away and shot himself did I suppose that was at all seriously embarrassed. I thought that he might be pressed for ready money, but that he had sufficient property, than enough, to pay us and everybody else, if he owed any else.

52 Q. Had he any stock of the company at the time that he this bond and mortgage?

A. Yes, sir. He was the owner of stock.

53 Q. Did you know what he had done with that?

A. It was pledged for a loan.

54 Q. You knew that it was pledged for a loan?

A. No; I did not know it then. I knew it afterwards.

55 Q. You did not ask him to deposit any of his securities as lateral for this?

A. I do not think I did. I think the conversation was, "What kind of security can you give us?" and the remark was that could give us a bond and mortgage on real estate, which would the best security, or something of that kind. When he did deny the charge on my question whether there were any matters in which we might be involved, and he offered to give this bond and mortgage, I said, "You must make it large enough cover anything about which there is any possibility of doubt

By Mr. Buckton:

56 Q. Did he fix the amount?

A. He said he would make it $15,000.

57 Q. Did he say that would cover it?

A. I do not remember that he said that. But in answer to what I said, he said, "Then I will make it $15,000."

58 Q. How long a time intervened between the time when you gave directions to Mr. Mason to have the matter looked up in the orphans' court, and the time you had the report about this trust from him?

A. I think I had the report next day after I asked Mr. Mason to look it up. I should say within three days after I told him. My request to Mr. Mason to make the examination was a few days before the bond and mortgage were executed.

118 Mr. Burton offered in evidence two bills of Joseph Trotter & Co., found in the diary of Henry C. Thompson, which has already been in evidence as part of the same.

Marked Exhibits Nos. 7 and 8, April 23, 1892, C. H. G.

Adjourned until Saturday, April 30, 1892, 11.30 a. m.

Saturday, *May* 21, 1892—11.30 a. m.

Present: The examiner (Col. Bell) and Messrs. Burton and Hannis, of counsel.

Counsel for the complainant offers in evidence the act of assembly of the Commonwealth of Pennsylvania, approved February 24, 1834, sections 38, 39, 40, 41, 47, 57 and 58.

Also the first section of the act of assembly approved April 13th, 1859.

Act of assembly approved February 24, 1834.

Section 38. No administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate.

Section 39. Whenever distribution as aforesaid shall be required by any person interested, the administrator shall present to the orphans' court having jurisdiction of his accounts, a statement of all demands against the estate which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue, under the direction of the orphans' court aforesaid.

Section 40. After six months elapsed from a distribution made as aforesaid, the like proceedings, in all respects, may be had
119 for distribution of further assets, if any shall then remain, after deducting as aforesaid, for other demands which may have been made known to the administrator, and so, from time to time, until the whole estate shall be settled and distributed.

Section 41. Before any person shall be entitled to receive any

share in the distribution as aforesaid, he shall give sufficient real or personal security, to be approved of by the orphans' court having jurisdiction as aforesaid, in such sum and form as the said court shall direct, with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand, and of the costs and charges attending the recovery of the same, but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the orphans' court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it.

SECTION 47. Executors, after one year elapsed from the granting of the administration of the estate, upon the requisition of the legatee, or any other person interested, shall pay and deliver, under the direction of the orphans' court having jurisdiction of their accounts, all such legacies as are due and payable by them or a proportionate part thereof, first deducting all demands against the estate, and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue, distributable under the intestate laws of this Commonwealth, they shall also distribute the same; and the proceedings in any such case shall in all respects, whether of security or otherwise, be the same as are herein-fore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will permit.

SECTION 57. Executors or administrators making distribution, or paying or delivering any legacies as aforesaid, shall not be liable for the assets so paid or distributed, in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken, as herein-fore provided.

SECTION 58. Executors and administrators may make distribution, and pay or deliver legacies, without application aforesaid, to the orphans' court, upon such security as may be satisfactory to them, nevertheless at their own risk.

Act of assembly approved April 13, 1859.

SECTION 1. Where any executor, administrator or guardian has been required, or hereafter shall be required upon the receipt of money, to give a refunding bond as required by law, it shall be lawful for such executor, administrator or guardian, upon paying over such money to creditors, heirs, legatees, or ward, to require, under the direction of the orphans' court, a bond, refunding receipt, or other obligation from the person or persons receiving the money, to indemnify such executor, administrator or guardian to the amount each one may receive. And whenever such ward has reached lawful age and is a married woman, it shall be competent for her, either in person or by attorney, to sign, seal and deliver her

own refunding bond to such guardian or his legal representative, with the same effect as if she were unmarried and were receiving said money directly from the executor or administrator.

Counsel for complainant also offer in evidence a copy of the rules of the orphans' court of Philadelphia county, which were in force between the first day of November, A. D. 1887, and the first day of August, 1889, during which time the settlement of the estate of James Saul, deceased, had been committed to Henry C. Thompson and Rev. Benjamin Watson, D. D., as the executors of said decedent. (Marked by the examiner "Exhibit A, May 21, 1892," and to be appended to these depositions.)

Mr. Hannis objects to the offer in evidence of the acts of assembly above referred to, and the rules of the orphans' court, as irrelevant and immaterial. It is not intended by the objection to deny that the copies produced are sections from the acts of assembly and from the rules of court, and in force as stated in the offer.

121 JAMES HOLLY, having been recalled, was further examined, as follows:

By Mr. BURTON:

78 Q. Mr. Thompson has stated on page 86, of the testimony, that he wrote you a letter informing you of the fact that your money was not deposited in the Real Estate Title Company. Can you produce the letter to which he refers?

A. I can.

Witness produces letter, which reads as follows, and which is marked "Exhibit B, May 21, 1892," and offered in evidence by Mr. Burton:

JULY 15.

Mr. James Holly.

DEAR SIR: As far as I have been able to find out, the money you deposited with father was not turned over to the title Co.

Yours truly, H. C. THOMPSON, JR.

(Letter objected to as irrelevant.)

79 Q. When was that letter received by you?

A. In the due course of mail. Either on the 15th or 16th of July, 1890.

80 Q. State whether or not you first learned of the money having been paid over to the Domestic and Foreign Missionary Society before or after your attachment proceedings were issued.

(Objected to as irrelevant.)

A. It was after the attachment.

81 Q. The first knowledge that you had that it went to the Domestic and Foreign Missionary Society was after the attachment was issued?

(Objected to.)

A. Yes, sir.

Testimony closed for the complainant before the examiner in Philadelphia, reserving the right to continue the same before the examiner in New York; and also to take further testimony before the examiner in Philadelphia, should complainant's counsel wish to do so before closing their testimony finally.

122 United States Circuit Court, Southern District of New York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY and E. Walter Roberts.

Testimony on the part of the complainant, taken before William B. Anderson, special examiner, appointed by an order of the court dated the sixth day of December, 1894.

Appearances: Mr. Cephas Brainerd, for the complainant. Mr. Herbert Barry and Mr. C. E. Hodgkiss, for the respondents.

It is stipulated on the part of counsel for the respective parties that the testimony may be taken down by a stenographer, and written out, and used on the trial without being signed by the witnesses, or without their being resworn by the commissioner upon their signing their testimony.

The counsel for the respondents reserves the right to interpose objections hereafter to any of the testimony taken, except that he will not object to questions as leading.

Mr. G. W. ROBINSON, being duly sworn, testified as follows:

By Mr. BRAINERD:

1 Q. What is your business?

A. I am a book-keeper.

2 Q. Where?

A. The Bank of New York.

3 Q. How long have you been there?

A. Twenty-nine years.

4 Q. A subpœna was served upon the bank, was it not, to produce its books?

A. Yes, sir.

123 5 Q. Books containing the account of the defendant, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church, between certain dates?

A. Yes, sir.

6 Q. Between what dates?

A. Between June 2, 1890, and August 6th, or the next balance which was after that. The subpœna calls for the next balance.

7 Q. Have you produced the books?

A. I have not brought the books, but I have produced a copy of the account called for in the subpœna, taken from the original entries in the books.

8 Q. Is this the account?
A. Yes, sir.

Account produced, consisting of six sheets, and offered in evidence, and marked "Complainant's Exhibit I," of this date.

9 Q. Look at the paper I now show you; what is that?
A. It is an original deposit ticket.
10 Q. Of what date?
A. The 20th of June, 1890.
11 Q. I notice marks in pencil upon it.
A. Yes, sir.
12 Q. What are those?
A. Those show what bank the checks were on, or what part of the country they were on.
13 Q. I call your attention to the pencil mark opposite $15,577.54; what is that?
A. That is an item, or check, or draft on the State of Pa., or Philadelphia; sometimes one and sometimes another. "Pa." stands for Pennsylvania usually.

I offer that in evidence.

Original marked "Complainant's Exhibit I" for identification. The copy marked "Complainant's Exhibit 2."

Cross-examination.

By Mr. BARRY:

14 X Q. In whose handwriting are the pencil marks?
A. A clerk at the bank.

124 The original deposit ticket is returned to the bank, and the copy is substituted.

15 X Q. Who made out these sheets you put in evidence?
A. I did.
16 X Q. You did personally?
A. Yes, sir.
17 X Q. From what books?
A. The ledger and cash book.
18 X Q. Who wrote up the ledger and cash book respectively?
A. Well, I wrote some of them up and my assistant wrote the others. Most of the figures are my own. Some days I wrote up the cash book and some days my assistant wrote it up. At that time we had a different system. Some days he was with me and some days he was not. When he was with me he wrote up the cash book.
19 X Q. The cash book represents the deposits?
A. No; the debits or checks are entered in the cash book, and as there are a great many of them they are posted in totals.
20 X Q. And the ledger shows both sides of the account?
A. Both sides. The account that I give you is more in detail,

because you have the items in this account as they come in. There might be a dozen sheets in the ledger posted on the debit side.

21 X Q. Then these sheets are not copies of either the ledger or the cash book?

A. Yes; they are copies of the cash book, because the cash book has everything in detail.

22 X Q. Now, take this first page by these sheets; what is that a copy of?

A. This is the credit side and this the debit side.

23 X Q. But is that a copy of the ledger?

A. No; I took the totals from the ledger, and went to the cash book and got out the items from that

24 X Q. Is it a copy of the cash book?

A. It is a copy of the cash book, and it agrees with the ledger.

25 X Q. Is that page a copy of any page in the cash book?

125 A. No; the credits are not in the cash book.

26 X Q. Then this is not a copy of any book you have in the bank?

A. No; it is a compilation of the ledger.

Redirect examination.

By Mr. BRAINERD:

27 Q. As it stands it is not a copy of any book in the bank, is it?

A. No; you could not say it was literally so.

28 Q. It must either be a copy or it is not a copy of the book; a categorical answer, is it or is it not?

A. That is according to what you mean by it. I should call it a correct copy of the account.

29 Q. But you do not find these items in the ledger?

A. You would find some of them.

30 Q. Some of them you do not find in the ledger?

A. You find some.

31 Q. Answer my question, please. Are there some of them that do not appear in the ledger?

A. All appear in the ledger.

32 Q. From what do you take the left-hand column of figures upon these sheets in their several items as here exhibited?

A. First, I take the ledger and find a certain amount in it. It is made up of more than one item, and I go to the cash book to get that amount of items which will make up the amount there.

33 Q. To get the items?

A. Yes.

34 Q. Well, then, as I understand you, tell me whether I am correct or not; these left-hand pages exhibit the entire account as shown by the cash book?

A. Yes, sir.

35 Q. That is to say, in the cash book you enter each item of the gross deposits of the day?

A. Not deposits; each item of the checks for the day.

36 Q. They are entered separately; every check is entered separately?

A. Yes, sir.

126 37 Q. And the cash book exhibits all the checks that were drawn by this defendant upon your bank?

A. Yes, sir.

38 Q. Every one?

A. Yes, sir.

39 Q. And these left-hand pages exhibit each one of the checks the day they were drawn, and the amount; do they not?

A. The day they were paid and the amounts; yes, sir.

40 Q. Now, as I understand you, where a number of checks came in during the course of a day, you would then aggregate the total amount of those checks in a single item in your ledger, would you?

A. Well, a number of checks come in from the clearing-house in the morning, and those are entered in the cash book and posted in the ledger.

41 Q. So that the debit side of the ledger of your bank does not exhibit a detailed statement of all the checks that you received from the defendant?

A. No, sir.

42 Q. It only exhibits, on frequent occasions, totals?

A. Totals.

43 Q. And the footing of your cash book giving checks drawn, does it or does it not, correspond with the footing of your ledger?

A. It corresponds.

44 Q. The books would not be correct if it did not?

A. No.

45 Q. Now the right-hand side of the account, as I understand it, contains the deposits?

A. Yes, sir.

46 Q. And those do not appear at all in the cash book?

A. The postings in the ledger are posted from the tickets.

47 Q. And these items are the aggregates of the tickets, are they not?

A. Each ticket is posted by itself.

48 Q. In one sum?

A. Yes, sir.

127 49 Q. So that when you desire to ascertain the details of any particular item of credit or deposits you have to go to the deposit ticket?

A. Yes, sir.

50 Q. And that exhibits the several amounts out of which the gross sum that appears in the ledger is made?

A. Yes, sir.

51 Q. I see upon the first page of the account, under date of June 20th, the sum of $16,540.26. Is that item taken from the deposit slip which you have produced?

A. Yes, sir.

Recross-examination.

By Mr. BARRY:

52 X Q. Mr. Robinson, this is not a copy, then, of any one book?

A. No; it is not a copy of any one book.

53 X Q. On what dates did you render accounts to the Domestic and Foreign Missionary Society in the year 1890?

A. Here we do not render an account. We balance their book as they bring it in. That statement shows two of the balances we made on their books.

54 X Q. This statement you say shows the balances that were made up in their books?

A. At that time; on their pass book.

55 X Q. Then this statement and the statement appearing in their bank book at that period ought to be identical.

A. It would be a copy of their pass book at that time, excepting that this statement has the dates after it. We never put any dates to the debit side of the book in writing it up, but in this case we were given the dates when they were paid; otherwise it will agree with their pass book.

56 X Q. This runs from June 2d to August 5th?

A. I think so; I am not sure. Well, up to the morning of August 6th.

By Mr. BRAINERD:

57 Q. If I understand this account correctly, Mr. Robinson, the pass book of the missionary society was balanced the 2d of June, 1890?

A. It included the work of the first of June and was brought down to the second of June.

128 58 Q. The balance on that day when it was carried down was $65,945.21, was it not?

A. Yes, sir.

59 Q. Then the account ran on, as I understand it, to July 2d?

A. Yes, sir.

60 Q. And was brought down to July 3, 1890?

A. Yes, sir.

61 Q. And it was then $39,845.41?

A. Yes, sir.

62 Q. And it was next balanced, the account running on, on the fifth of August, 1890?

A. Yes, sir.

63 Q. And was brought down to the sixth, and was then $18,757.82?

A. Yes, sir.

WILLIAM B. ANDERSON,
Special Examiner.

ARTHUR M. BURTON, being duly sworn, testified as follows:

By Mr. BRAINERD:

1 Q. Mr. Burton, you are counsel for the plaintiff, James Holly, are you not?

A. Yes.

2 Q. How long have you known him?

A. Well, for ten years and a half, I think; perhaps longer.

3 Q. He has been a client for years during that period?

A. No; I do not think he was a client of mine at all until just about the commencement of this matter. I may have had charge of other matters for him, but I do not remember.

4 Q. You are a member of the Philadelphia bar?

A. I am.

5 Q. How long have you been a member?

A. Forty years and upwards.

129 6 Q. When was your attention first brought to this matter, the claim of Mr. Holly?

A. It was on the evening of the fifteenth of July, 1890. Mr. Holly came to my residence in Spruce street to speak about the matter, about seven or eight o'clock in the evening.

(Mr. Barry objects to the statement of what plaintiff's counsel said.)

7 Q. Did Mr. Holly at that time mention to you this $12,000 check which is in controversy here?

(Mr. Barry objects to any statement that Mr. Holly made to his counsel at this time as a communication with Mr. Holly and his counsel, and as hearsay evidence.)

A. He first informed me of the fact that he had some time previously employed Mr. Henry C. Thompson to act as real-estate agent in the purchase of a property on North Fifteenth street, and that he had, for the purposes of getting the transfer, made and deposited $12,000, and given him a check for that amount.

8 Q. Now, can you tell what you did?

A. In consequence of the information, I requested him to call upon me the next morning, and he did so, and we went together to the office of the Fidelity Company in Philadelphia, where Mr. Holly had his bank account. I called upon the officer to produce this cancelled check of $12,000, and upon stating the circumstances to him that required its immediate production he brought it out.

9 Q. That is the check already put in evidence?

A. Yes; given by James Holly to Mr. Henry C. Thompson, and upon looking at the check I inquired and learned that the check had been deposited with the Union Trust Company. They have numbers on the checks (our banks) by which they identify, and I went up immediately upon getting the check with Mr. Holly to the office of the Union Trust Company, in Philadelphia, and there I inquired if the money ($12,000) was still on deposit with

that company, and learned from them that all the money on deposit had been paid out, excepting about $100.

10 Q. That is in Mr. Thompson's bank account?

A. Drawn out of Mr. Thompson's bank account; all ex-
130 cept $100. I further was informed that one large check had been drawn through the National Bank of North America in Philadelphia. I went down with Mr. Holly then to the National Bank of North America, saw the president, and asked him where that check had gone to; told him I had been informed that it had been cashed from their bank. He declined to tell me. He said they did not give such information to inquirers unless it was in response to legal proceedings that had been taken. I then went to the office and prepared an affidavit for Mr. Holly to make as the basis of a proceeding by attachment of the defendant's effects wherever they might be found, under what was called in our State "the fraudulent debtors' act" (act 1869 and its supplements). On the next day that writ was issued, and I directed it to be served on the National Bank of North America, the Union Trust Company, and anywhere and everywhere I supposed any funds of Henry C. Thompson could be found. I, immediately after it was issued, went with the officer, or soon after it was served, and applied again to be informed where this money had gone, this large amount of money that had been drawn out of the Union Trust Company. They informed me that it had been drawn in a check of $15,000 and upwards in favor of the Bank of New York (National Banking Association I suppose it is called), and upon that information being given me, and that it was also to the order or for the account of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the City of New York. I wrote to the treasurer, George Bliss, Esq., and sent him a letter, of which a copy has been produced in evidence, and has been annexed, I think, to the answer to the plaintiff's bill in this case.

11 Q. What date was that?

A. July 17, 1890. I got no answer to that letter, and on the 31st of July I came over to New York with Mr. Holly, and went up to the office of the Domestic and Foreign Missionary Society, and I presume it was Rev. Mr. Langford that I met in the office; I think it was; I do not think it was Mr. Roberts; I do not remember having seen him, and I handed him a letter, of which the paper I now produce is a copy; I handed a letter to Mr. Langford for Mr. Bliss, of which
the paper now produced is a copy. That copy I have taken
131 from my press copy of the typewritten copy on my letter book, which I took before I came to New York.

Offered in evidence; marked "Plaintiff's Exhibit 3."

Copy marked in evidence, subject to correction by counsel for the defendant-.

The right to make objections reserved.

Mr. Langford said they had received my first letter, but Mr. Bliss was not generally at the office; in fact, knew very little about the business of the office, but that the business was transacted by Mr.

Roberts. I am not sure whether they mentioned Mr. Roberts now or not, but Mr. Bliss had no particular charge of the business, but was simply what I understood to be an officer in name, not in reality. At all events, he said, they had referred my first letter to their counsel, and that their counsel had corresponded, as I understood him to say, with the counsel in Philadelphia, and this letter that I handed to him would also take the same course. I do not know of anything else that was said, and on the delivery of the letter I returned. I might say that I sent a copy of the affidavit on which the attachment was issued, I think in my first letter to the society.

12 Q. Well, what became of the attachment proceedings?

A. The attachment proceedings remained pending for over a year. We have a rule in our State that unless a declaration is filed within a year the defendant's counsel could move to discontinue the proceeding upon mere motion, and thus before the end of the year I filed a statement in accordance with that rule, embodying pretty much what was set forth in the original cause of action, and let it stand. I would not take judgment because I did not wish to be precluded in any way, but left the proceeding entirely open.

13 Q. Have you a copy of that statement with you, or is it a part of the record?

A. Part of the record. There was nothing further done except to keep it alive until I requested Mr. Brainerd to ask leave of the court here to proceed with that attachment. This proceeding had been commenced, and while that was going on a move was
132 made by the defendant's counsel, but there was no appearance for the defendant in the proceedings. A motion was made to dismiss the attachment proceeding, but the court refused to dismiss it at that time. That was while this motion here in New York was pending for leave to prosecute without prejudice.

14 Q. That application was made for leave to prosecute without prejudice?

A. I requested it to be done, and I understood it was done. I was at court here in New York.

15 Q. Do you understand that that application was opposed?

A. I understand and understood at that time that it was opposed—never any consent at all given.

16 Q. And do you understand also that it was finally denied by the judge?

A. Upon information that it was denied by the judge after being opposed by the other side, I then, by request of Mr. Holly, had that attachment discontinued and paid all the costs of the suit, but that attachment was made the ground-work of the petition for leave to discontinue without prejudice, and it was so granted, as the record will show.

Cross-examination.

By Mr. BARRY:

17 X Q. Have you seen the papers for and against the application made in the New York court or in the Federal court for the southern district of New York for leave to continue the proceedings?

A. I do not think I have seen the papers that were on file, but I think Mr. Brainerd has furnished me with some copies of the proceedings from which I got the information.

18 X Q. Did you see the papers which were filed by the respondents upon that application?

A. I suppose I saw something in reference to them; I do not know whether I saw copies of the papers or not, but certainly I understood the substance from Mr Brainerd.

19 X Q. Did those papers or copies of papers which you saw, and which were submitted by the respondents, contain copies of the record in the attachment suit in Philadelphia?

133 A. I do not recollect; in fact, I do not recollect having seen any copies as they were presented in the case here. I think I saw some abstracts that were furnished me by Mr. Brainerd.

Exhibits 1 and 2 delivered to Mr. Barry by consent.

Hearing adjourned to January 8, 1895.

WILLIAM B. ANDERSON,
Special Examiner.

Hearing continued, pursuant to adjournment, February 12, 1895.

Appearances: Cephas Brainerd, Esq., for the complainant; Herbert Barry, Esq., for the defendant.

The complainant puts in evidence, for the purpose of completing the records of the attachment suit, a portion having been put in evidence before the examiner, in Philadelphia, the answer of Henry C. Thompson, Jr., as garnishee in the suit of James Holly *vs.* Henry C. Thompson and others endorsed, filed February 28, 1894.

Objected to on the ground that it is subsequent to the commencement of the action, and is not set forth in the pleadings.

Received and marked "Plaintiff's Exhibit 4."

The petition of Henry C. Thompson, Jr., in the same action, filed February 3, 1894.

Same objection.

Received and marked "Plaintiff's Exhibit 5."

The affidavit of James Holly in the same action, filed April 14, 1894.

Same objection.

Received and marked "Plaintiff's Exhibit 6."

And the docket record of the court of common pleas in the same action, certified on the fourth day of February, 1895.

Received and marked "Plaintiff's Exhibit 7."

134 The complainant offers in evidence the record of the motion made in the United States circuit court before Judge

Lacombe, being the notice of motion and the petition of the plaintiff, the affidavit and reply by the defendants, and the order of the circuit court by Mr. Justice Lacombe on such application, dated the sixteenth day of February, 1894.

The respective counsel stipulate that in lieu of the printing of these papers either party may refer to the original file producing it upon the final hearing of this cause.

Counsel for the defendants assents to this provision, the stipulation to be without prejudice to any objection which may be taken by the defendants to the admissibility of the evidence.

The foregoing record not produced or marked in evidence, but admitted under the foregoing stipulation.

Adjourned to Tuesday, February 19, 1895.

WILLIAM B. ANDERSON,
Special Examiner.

135 Circuit Court of the United States for the Southern District of New York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT Episcopal Church in the United States of America and E. Walter Roberts.

The respondents having closed their testimony, the following testimony was taken before William B. Anderson, Esq., special examiner, in the city of New York, on behalf of the complainant in rebuttal.

Same appearances.

It is agreed between counsel that the certified record now produced may be substituted for Exhibits 4, 5, 6, & 7, February 12, 1895, which were copies of portions of balance of record, subject to the same objections.

Offered in evidence. Received and marked "Complainant's Exhibit 8" of this date.

Mr. BURTON, recalled, testified as follows:

By Mr. BRAINERD:

20 Q. I ask you in regard to Exhibit 8 of this date, whether it is or not in the regular form for the discontinuance of actions according to the practice of the State of Pennsylvania?

Objected to by defendants' counsel as not the best evidence, and calling for a conclusion of the witness.

A. Yes; it is.

21 Q. And you actually paid the costs?

A. I actually paid all the costs of that suit.

22 Q. Now, Mr. Burton, have you gone over the bank account produced here by the book-keeper of the Bank of New York?

136

A. I have; according to the copy which I have taken of it.

23 Q. And have you made a statement of the amount to the credit of the defendant on the several days between the 2nd day of June, 1890?

A. When the bank was opened, and continued down to August 5, 1890.

24 Q. And have you made a statement of the balances remaining in the bank on every one of those days?

A. On every day that there was a change in the account I made a statement of the balances.

25 Q. And is the paper I now show you that statement?

A. It is.

26 Q. The first left-hand column is the dates, is it not?

A. The dates taken from the accounts.

27 Q. I am referring to the two accounts that were produced. The first left-hand column is the dates, is it not?

A. Yes.

28 Q. The second column is the amount of checks drawn?

A. Yes.

29 Q. What is the third?

A. The third is the total of the deposits of that day, and of the balance on hand at the beginning of the day. In other words, the deposits of that day, added to the daily balances in the morning, make up the total of each day's credit side of the account.

30 Q. The fourth column, what is that?

A. A schedule of the deposits of each day.

31 Q. So far as deposits were made?

A. Yes, they corresponded exactly with the deposits as they were made.

32 Q. And now the fifth column?

A. The fifth column is the column of daily balances.

33 Q. So that the final column marked "balances" is the balance which was on hand at the end of each day?

A. Yes; at the end of each day's business.

34 Q. The spaces in columns where there are no figures of
137 amounts opposite the dates indicate that there was no change in the account as respects the columns where there are these omissions, I suppose?

A. Well, now, if you will take, say the dates of the 4th and 5th of June, no deposits were made on those two days, but there were checks drawn against the balances, and then on the 6th of June there was a balance due, and then deposits made, and so on.

35 Q. Then the spaces in columns where there are no figures of amounts opposite the dates indicate that there was no change in the account as respects the columns where there are these omissions?

A. Yes.

Paper offered in evidence. Received and marked Plaintiff's "Exhibit 9" of this date.

Objected to by defendants' counsel on the ground that it has no

force as evidence, and that it does not show the true state of the defendants' deposits, and does not include checks that were drawn and presented.

Complainant's counsel does not contend that it is in itself evidence, but that it is a mere summation of the accounts for the convenience of counsel and for the convenience of the court.

Submitted subject to corrections, if any shall be found.

Mr. BURTON, continuing: The balance shown at the end of this account appears to be $18,757.82, the balance of the date of August 6. The balance which I make on my account is $18,765.82. Now, if you will take the debit side of this account, which is $62,654.75, from the credit side, which is $81,420.57, you will find that my figures are the proper balance of that account. The difference is only about $8.

It is stipulated that the exhibits in the custody of the special examiner here, received from the special examiner in Philadelphia, Samuel Bell, be returned to him by express by the examiner here.

WILLIAM B. ANDERSON,
Special Examiner.

February 27, 1896.

138 COMPLAINANT'S EXHIBIT A.

C. C. U. S., So. Dist. of New York.

HOLLY
vs.
DOMESTIC & FOREIGN MISS'Y SO.

March 12, '92. Samuel Bell, Sp. Ex'r.

(See p. 50, folio 15.)

Copy of Check for $12,000.

No. —. PHILADELPHIA, *June* 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co.

Pay to Henry C. Thompson, att'y, or order, twelve thousand dollars.

$12,000. JAS. HOLLY.

The Fidelity Insurance, Trust
Paid
Jun- 19, 1890
and Safe Deposit Co.

(*Copy of Endorsement.*)

For deposit. H. C. Thompson, att'y. For collection the Union Trust Company, Philadelphia, M. S. Stokes, treasurer.

139 COMPLAINANT'S EXHIBIT B.

C. C. U. S., So. Dist. of New York.

HOLLY
vs.
DOMESTIC & FOREIGN MISS'Y SO.

March 12, '92. Samuel Bell, Sp. Ex'r.

(See p. 50, folio 15.)

Copy of Receipt Given by Thompson to Holly for $12,000.

Craig D. Ritchie, president; Henry C. Thompson, solicitor; Lewis S. Renshaw, sec'y & treas.; Joseph Mason, trust officer; Charles V. MacManus, title officer.

The Real Estate Title Insurance & Trust Co.

PHILADELPHIA, *June* 19, 1890.

Received from James Holly, twelve thousand dollars, & J. A. Freeman's receipt for $200 to be applied to purchasing house No. 643 North Fifteenth street.

$12,000.

(Signed) H. C. THOMPSON.

140 COMPLAINANT'S EXHIBIT C.

C. C. U. S., So. Dist. of New York.

HOLLY
vs.
DOMESTIC & FOREIGN MISS'Y SO. } Ex. C.

March 12, '92. Samuel Bell, Sp. Ex'r.

(See p. 57, folios 42 & 43.)

The Bank Book of the Union Trust Co., 611 & 613 *Chestnut Street, Philadelphia, in Account with H. C. Thompson*, 1001 *Chestnut.*

Stipulations.

Checks upon this account payable on call.
Interest at the rate of 2 per cent. per annum will be allowed on all deposits to this account.
The company reserves the right to close any account.
Leave book for settlement and credit of interest April & October.
(The account is opened as follows:)

DR.	CR.
The Union Trust Company of Philadelphia.	H. C. Thompson, 523 Chestnut.

1885.
Feb'y 14. C..... ... $500

(Closed.)

1890.
7 30. Balance..... $72 41

(NOTE.—See Complainant's Exhibit No. 2, March 19th, 1892, Samuel Bell, sp. ex'r, 3, 9, '92, where by crediting account with interest to Dec. 1, '90, $6.60 the balance appears increased to $79.01 from $72 41 as above. See pp. 146, 147. As this Exhibit No. 2, M'ch 19, '92, contains all that is material in this cause, the printing of the bank-book account as a whole is waived. See stipulations following the index.)

141 EXHIBIT D.

March 12, 1892. Printed in testimony. See page 57, folio 44, and stipulations of Sept. 5, 1896, and Sept. 29, 1896, following the index.

EXHIBIT E.

March 12th, 1892.

(See p. 58, folio 45.)

(*Copy of Check.*)

$15,577.54. PHILADELPHIA, *June 19th*, 1890.

The Union Trust Company, Nos. 715, 717, 719 Chestnut street,

Pay to the order of the Domestic & Foreign Miss. Soc. of the P. E. Church fifteen thousand five hundred and seventy-seven dollars $\frac{54}{100}$.

No. 623.
(Signed) H. C. THOMPSON.

Interest allowed on deposits.

Copy of Endorsements.

Bank of New York. Endorsement Guaranteed N. B. A. Endorsement Bank of North America.

For deposit in Bank of New York, N. B. A. for account of the Dom. & For. Missionary Soc'y of Protestant Episcopal Church in U. S. A.
(Signed) GEORGE BLISS, *Treasurer*,
Per E. W. ROBERTS,
Ass't Treas.

12 o'clock Stamp punch The Union Trust Comp'y, Phila., Pa. 1890. P. M., June 21. Paid.

Pay Bank of North America of Philadelphia, or order, for account of Bank of New York, N. B. A.
(Signed) E. S. MASON, *Cashier*,
(Signed) J. Y. MINNUTIM, *A. S.*

142 EXHIBIT F.

March 12, 1892.

(See p. 62, folio 64.)

Copy of Account Taken from H. C. Thompson's Books.

Estate of JAMES SAUL.

1888.				Dr.
M'ch	6.	To cash, adv.		$3 00
Ap'l	7.	" " undertaker		125 00
Nov.	"	" " ack't deed		2 00
	24.	" " Episcopal hospital		318 57

1889.					
Feb.	9.	To cash, Van Gunden & Young			380 75
Ap'l	12.	" " sodding lot			12 00
Sept.	5.	" " R. R. Bringhurst			62 00
	26.	" " filing a/c			23 50
Nov.	1.	" " Dr. Moon			52 00
Dec.	23.	" " Rev. Dr. Watson, ½ com.			445 45
1890.					
June	19.	" " P. E. mission			15,577 54
				Cr.	
1887.					
Dec.	29.	By cash, F. & M. bank		2,493 03	
1888.					
Jan'y	7.	" " Dividend United R. R.		125 00	
		" " Dividend N. Penn.		100 00	
Feb'y	1.	" " London & Globe Co.		1,750 00	
June	28.	" " Dividend United R. R.		62 50	
		" " Dividend N. P. R. R.		100 00	
Aug.	23.	" " Dividend N. P. R. R.		100 00	
		" " Dividend U. R.		62 50	
	25.	" " Jos. H. Trotter & Co.		2,486 25	
1889.					
Feb'y	9.	" " Jos. H. Trotter		5,748 75	
	13.	" "		5,689 75	
M'ch	11.	" " Dividend U. R.		125 00	
		" " " N. P.		70 00	

COMPLAINANT'S EXHIBITS G AND H.

Not printed, not having been offered in evidence. (P. 72, folios 102, 103.)

143 EXHIBIT J.

March 12, 1892.

(See p. 72, folio 103.)

Whereas the late Reverend James Saul heretofore, by power of attorney, dated on the 5th day of October, 1887, constituted and appointed Reverend Joseph Blount Cheshire, Jr., of Charlotte, North Carolina, his true and lawful attorney to sell and convey a certain lot of land in Mecklenburg county, State of North Carolina, and known as lot four hundred and eleven (411) in the plan of the city of Charlotte, and upon receipt of the consideration money to use the same in his discretion for the use and benefit of the parish school of the Church of Saint Michael's and All Angels at Charlotte, North Carolina; and

Whereas the said Reverend James Saul departed this life before action was taken under the said power of attorney, whereby the same was revoked, leaving his last will and testament, by which this society was made his residuary legatee with full power of sale

to his executors in their discretion, to sell and convey his real estate; and

Whereas the said Reverend Joseph Blount Cheshire, Jr., has applied to this society to authorize the said executors to convey to him the said lot of land for the purpose of making sale thereof and applying the proceeds to the benefit of the said parish school,

Resolved that the executors of the said the late Reverend James Saul be and they hereby are requested and authorized to convey to the said Reverend Joseph Blount Cheshire, Jr., of Charlotte, North Carolina, the said lot of land, known as lot number four hundred and eleven (411) on the plan of the city of Charlotte in the State of North Carolina.

A true copy from the minutes of the Domestic & Foreign Missionary —.

September 12th, 1888.

{ Society Prot. Epis. Church, Sep. 17, 1888, }
{ 21 to 26 Bible House, New York City. }

Attest: JOSHUA KIMBER,
Associate Sec'y Board of Managers, &c., &c.

144 EXHIBIT K.

March 12th, 1892.

DEFENDANTS' EXHIBIT.

Printed in complainant's testimony. See pages 73 to 77, folios 108 to 124.

EXHIBIT L.

March 12th, 1892.

Printed in complainant's testimony. See page 80, folios 134 and 135.

EXHIBIT L 1.

March 12, 1892.

Printed in complainant's testimony. See page 78, folio 127.

EXHIBIT L 2.

March 12, 1892.

Printed in complainant's testimony. See page 79, folio 129.

EXHIBIT L 3.

March 12, 1892.

Printed in complainant's testimony. See page 79, folio 131.

145

Exhibit M.

(See p. 81, folio 137.)

To the honorable the judges of the orphans' court of the county of Philadelphia:

The petition of Benjamin Watson, D. D., and Henry C. Thompson, executors of the will of James Saul, D. D., late of the city of Philadelphia, deceased, respectfully represents:

That the account of the said executors was duly filed on the twenty-sixth day of September, anno Domini 1889, was adjudicated on the fourth day of November, anno Domini 1889, and has been confirmed absolutely.

That the entire estate has been paid and transferred to the parties entitled thereto, with all moneys that have been received by them since the filing and adjudication of their account as will appear by the certificate hereto annexed.

Your petitioners therefore pray that they may be discharged.

(Signed) BENJAMIN WATSON.
(Signed) H. C. THOMPSON.

Henry C. Thompson, one of the above-named petitioners, being duly sworn, doth depose and say that the facts set forth in the above petition are true.

—— ——.

Sworn and subscribed before me this — day of June, anno Domini 1890.

Witness my hand and official seal.

—— ——.

Complainant's Exhibit No. 1.

March 19th, 1892.

Deposit Ticket of the Union Trust Company, June 19th, 1890.

(Printed in complainant's testimony, see page 88, folios 168 and 169.)

146 COMPLAINANT'S EXHIBIT No. 2, MARCH 19TH, 1892.

(See page 89, folio 171.)

C. C. U. S., So. Dist. of N. Y.

HOLLY *vs.* DOMESTIC & FOREIGN MISSIONARY SOCIETY.

Balance-sheet.

Henry C. Thompson, in ac.

1890.			
May 21	$422	$86 63	$508 63
	165	50	
22	750	35 45	
			1000 45
23			300 00
26			175 00
28			67 50
June 2	500	16 80	516 80
	75		
4	50	50	
			175 00
5			48 17
6			150 00
7			711 83
14			86 63
16	200	200	400 00
18			924 95
19			4066 67
	50	42	
21	507 58	15,577 54	
			16,177 12
23			250 00
24	100	7661 25	
	15	10	
			7786 25
26	15	50	65 00
27			280 00
28		20	
		10	
			30 00
30			33 00
July 2		10	
		103 77	
			113 77
	447 50		
3	7 50	302 83	
			757 83
5	42	1426 14	1468 14
7	215	29 75	244 75
9			35 50
12			350 00
15			10 00
Balance			79 01
			$36,812 00

147 COMPLAINANT'S EXHIBIT No. 2—Continued.

March 19th, 1892.

Samuel Bell, Sp. Ex'r. 3, 19, '92.

(See p. 89, folio 171.)

with the Union Trust Co.

1890.			
May 17.	By balance		735 71
19.	" cash		500 00
22.	" "		987 00
23.	" "		300 00
29.	" "		1471 60
31.	" "		514 68
June 6.	" "		506 92
10.	" "		1674 32
16.	" "		4500 00
19.	" "		15,000 00
20.	" "		104 35
24.	" int. to June 1		10 37
24.	" cash		8000 00
30.	" "		333 34
July 1.	" "		287 50
2.	" "		1879 61

PAGE CUT OFF

Dec. 23.	" int. to Dec. 1	6 60	
			$36,812 00
1891.			
[illegible] 1.	By balance		79 01

148 COMPLAINANT'S EXHIBIT No. 3.

March 19th, 1892.

(See page 95, folio 195.)

ELWOOD WILSON, JR.,
vs.
JAMES HOLLY.

Sale of Premises No. 1221 *Walnut St.*

Purchase-money		22500
Insurance		160
		$22660
Less—		
Mortgage of $15000 & int.	15442 50	
" " 3500 & int.	3589 50	
Taxes 1881	450 00	
" 1882, 4 days	4 40	
Water rent " "	25	
City claim	5 37	
Gas bill	7 75	
Paid auctioneer on ac.	300 00	
		19790
		2869

149 COMPLAINANT'S EXHIBIT No. 4.

March 19th, 1892.

C. C. U. S., So. Dist. of N. Y.

HOLLY
vs.
DOMESTIC & FOREIGN MISSIONARY SOCIETY.

Samuel Bell, Sp. Ex'r. 3, 19, '92.

(See p. 95, folio 195.)

James Holly in ac. with H. C. Thompson.

1882.			
Jan. 4.	To cash paid Wilson in settlement		2869
" 12.	" do.	Jones mtg. & int.	3584
	" do.	city claim	5
	" do.	retained for taxes, 1881	450
	" do.	Title Co., ins. title	65
	" do.	rec. deed & ins. transfr.	4
	" services		25
			7004

Jan. 4.	By cash	4000 00	
" 10.	" do.	3000 00	
			7000 00
	Balance		4 00

Paid Feb. 17, 1882.
(Signed) H. C. THOMPSON.

150 COMPLAINANT'S EXHIBIT No. 5.

March 19th, 1892.

C. C. U. S., So. Dist. of N. Y.

HOLLY
vs.
DOMESTIC & FOREIGN MISSIONARY SOCIETY.

Samuel Bell, Sp. Ex'r. 3, 19, '92.

Copy of Letter from Julien T. Davies to Hannis, Parrish & Williams.

(See p. 101, folios 219 & 220.)

NEW YORK, *November 13th*, 1890.

DEAR SIRS: I beg to inform you that at a meeting of the board of managers of the Domestic & Foreign Missionary Society, the following resolution was adopted: "Resolved, That the counsel of the board be instructed to advise Mr. James Holly that this board will entertain no proposition which involves the payment of money on account of his claim." The board deferred the consideration of the Rev. Doctor Watson's responsibility in the matter.

I would request you to be good enough to communicate the action of the board to Mr. Burton.

I remain very truly yours,

JULIEN T. DAVIES, *P.*

Messrs. Hannis, Parrish & Williams, Drexel building, Philadelphia, Pa.

COMPLAINANT'S EXHIBIT No. 6.

(See p. 102, folio 223.)

See stipulations of September 5, 1896, and September 29, 1896, following index. Printed as part of Complainant's Exhibit No. 8, April 25, 1896.

The record of the attachment suit, which was offered in evidence March 19, 1892, covered only so much of the proceedings in that suit as were of record at that date. Afterwards the whole record was put in evidence. See page 135, folio 354, and Complainant's Exhibit No. 8, page 173.

151 EXHIBIT No. 7.

April 23rd, 1892.

C. H. G. (See p. 118, folio 285.)

Copy of Bills of Joseph Trotter & Co.

PHILADELPHIA, *Aug.* 24, 1888.

Sales by Joseph Trotter & Co., stock brokers, No. 322 Walnut St for account of Henry C. Thompson, exec. of will of James Saul dec'd.

30 shares North Penn. R. R., @ 83		2490 0
Coms., ⅛	3 75	
Balance paid	2486 25	
	2490 00	2490 0

JOSEPH TROTTER & CO.

(Endorsed:) Holly *vs.* Domestic & Foreign Missionary Society C. C. U. S., so. dist. of N. Y. Comp't's Exhibit No. 7, April 23, '9

152 EXHIBIT No. 8.

April 23rd, 1892.

C. H. G. (See p. 118, folio 285.)

PHILADELPHIA, *Feb'y* 8, 1889.

Sales by Joseph Trotter & Co., stock brokers, No. 322 Walnut St for account of H. C. Thompson, ex'r of will of James Sau dec'd.

70 shares N. Penna R., 82¼		5757 5
Coms., ⅛	8 75	
Balance paid	5748 75	
	5757 50	5757 5

JOSEPH TROTTER & CO.

(Endorsed:) Holly *vs.* Domestic & Foreign Missionary Society C. C. U. S., so. dist. of N. Y. Comp't's Exhibit No. 8. Samue Bell, sp. ex'r. April 23, '92.

EXHIBIT A.

May 21, 1892.

(See p. 120, folios 295, 296.)

Not printed. See stipulations of Sept. 5, 1896, and Sept. 2 1896, following index.

EXHIBIT B.

May 21, 1892.

Printed in complainant's testimony. See p. 121, folio 298.

153 HOLLY
vs.
DOM. & FOR. MISS. SOC.

COMPLAINANT'S EX. No. 1 (Consisting of Six Sheets).

Dec. 18, '94. (Signed) William B. Anderson, Spec. Exam.

(See page 123, folio 306.)

Copy of Bank Account.

Domestic & Foreign Missionary Society of the Prot. Epis. Ch. in account with the Bank of New York.

National Banking Association.

DR.			CR.	
1890.			1890.	
June 2.	To —	3 28	June 2. By balance.....	65945 31
	.....	97 12	"	7671 41
	.....	105 00		
	.....	50 00		
	.....	39 17		
	....	30 35		
	.....	50 10		
	.....	40 00		
	.....	16 75		
	.....	10 00		
	.....	11 00	3.	7743 04
3.	.....	107 40		
	.....	100 00		
	.....	666 98		
	.....	200 00		
		(1527 15)		(81359 76)
154				
1890.			1890.	
June 3.	To am't forw'd...	(1527 15)	June 3. By am't forw'd..	(81359 76)
	.....	40 00		
	.....	411 50		
	.....	197 90		
	.....	17 50		
	.....	411 00		
	.....	41 66		
	.....	50 00		
	.....	17 15		
	.....	131 38		
	.....	5 00		
	.....	2528 81		
4.	.....	166 66		
	.....	687 50		
	.....	100 00		
	.....	50 00		
	.....	50 00		

		15 00				
		30 00				
		100 00				
		117 00				
	5.	1950 00				
		191 67				
		100 00				
		25 00				
		62 00				
		125 00				
		367 50	"	6.		3439 29
June	6.	100 00				
		190 83				
		2000 00				
		28 00				
		332 02				
		45 35	"	7.		15000 00
	7.	33 33	"	"		6527 53
		887 00	"	"		1302 80
155		(13132 91)				(107629 08)
1890.			1890.			
June	7. To am't forw'd....	(13132 91)	June	7. By am't forw'd...		(107629 38)
		33809 92				
		20 00				
		100 00				
		825 00				
		66 66				
		41 66				
		50 00				
		100 00				
		50 00				
		100 00				
		208 33				
		119 33				
		6 00				
		104 01				
		71 65				
		26 00				
		700 00				
		5 00				
	9.	3 50		9.		25000 00
		250 00				
		36 85				
		1125 00				
		1 00				
		700 00				
		875 00				
		100 00				
		750 00				
		362 92				
		113 88				
		31 65				
		20 00				
	10.	750 00				
		48 56				
		1075 00				
		30 00				
		(55809 83)				(132629 38)

1890.			1890.		
ne 10.	To am't forw'd....	(55809 83)	June 10.	By am't forw'd...	(132629 38)
	.....	125 00			
	.....	119 50			
	.....	625 00			
	.....	110 87			
	.....	200 00			
	.....	50 00			
11.	.....	40 00			
	.....	25 00			
	.....	210 00			
	.....	30 00			
	.....	125 00			
	.....	25 00			
	.....	750 00			
	.....	750 00			
	.....	3 15			
	.....	50 00			
	.....	50 00			
12.	.....	24 30	12.	.....	4599 12
	.....	5 59			
	.....	33 33			
	.....	300 00	"	.....	25 32
	.....	100 00			
	.....	50 00			
	.....	50 00			
	.....	875 00			
	.....	750 00			
	.....	200 00			
	.....	5 00			
13.	.....	500 00			
	.....	154 00	13.	.....	1407 64
	.....	1500 00			
	.....	6 30			
	.....	416 66			
	.....	240 00			
	.....	50 00			
		(64358 53)			(138661 46)
57					
1890.			1890.		
une 13.	To am't forw'd....	(64358 53)	June 13.	By am't forw'd...	(138661 46)
	.....	108 00			
	.....	271 89			
	.....	3594 64			
	.....	27 00			
14.	.....	290 00			
	.....	10 00			
	.....	295 00			
	.....	750 00			
16.	.....	95 00			
	.....	50 00			
	.....	1175 00			
	.....	100 00			
	.....	120 00			
	.....	20000 00			
	.....	475 00			
	.....	43 60			
	.....	121 00			
	.....	236 00			
	.....	85 00			
	.....	20 00			
	.....	50 00			
	.....	225 00			

		750 00			
	17.	39 39		17.	1797 96
		42 00			
		114 00			
		117 00			
		5 00			
		135 90			
		145 00			
		305 00			
		158 69			
		1525 00			
		150 00			
	18.	100 00		18.	499 22
		(96087 64)			(140958 64)
158					
1890.			1890.		
June 18.	To am't forw'd	(96087 64)	June 18.	By am't forw'd	(140958 64)
		40 00			
		75 00			
		25 00			
		75 00			
		25 00			
		41 17			
		150 00			
		75 00			
		50 00			
	19.	25 00			
		75 00			
		130 00			
		40 00			
		25 00			
		50 00			
		75 00			
		62 50			
		62 50			
		25 00			
		25 00			
		12 50			
		100 00			
		37 50			
	20.	70 00		20.	16540 26
		50 00			
		4 00		"	79 53
		10 00			
		25 00			
		75 00			
		25 00			
		37 50			
		37 50			
		25 00			
		75 00			
		25 00			
		(97847 81)			(157578 43)
159					
1890.			1890.		
June 20.	To am't forw'd	(97847 81)	June 20.	By am't forw'd	(157578 43)
		25 00			
		62 50			
		345 00			
		50 00			
		37 50			

		750 00			
		12 50			
		50 00			
		25 00			
		50 00			
		12 50			
		5 00			
		75 00			
		2 50			
		62 50			
		7 50			
21.		25 00			
		25 00			
		75 00			
		37 50			
		37 50			
		166 00			
		4 05			
		50 00			
		50 00			
		50 00			
		20 25			
		12 50			
		25 00			
		456 22			
		00			
		[illegible]			
		25 00			
		1668 67			
		50 00			
		(102298 00)			(157578 43)

160

1890.			1890.		
June 21.	To am't forw'd....	(102298 00)	June 21.	By am't forw'd...	(157578 43)
		37 50			
		50 00			
		100 00			
		100 00			
		75 00			
		54 45			
		66 30			
		75 00			
		100 00			
		50 00			
23.		50 00	23.		1783 39
		25 00			
		20 90			
		25 00			
		100 00			
		375 00			
		1 15			
		37 50			
		62 50			
		22 45			
		62 50			
		50 00			
		50 00			
		75 00			
		40 00			
		750 00			
		2494 27			
		125 00			
		261 99			

	.....	75 00			
	.....	11972 50			
	.....	21 75			
	.....	50 00			
	.....	12 50			
	.....	75 00			
		(119841 26)			(159361 82)
161					
1890.			1890.		
June 23.	To am't forw'd...	(119841 26)	June 23.	By am't forw'd...	(159361 82)
	.....	125 00			
	.....	10 00			
	.....	16 00			
June 24.	.....	75 00			
	.....	33 33			
	.....	37 50			
	.....	4 20			
	.....	150 00			
	.....	125 00			
	.....	12 50			
	.....	25 00			
	.....	147 00			
	.....	125 00			
	.....	25 00			
	.....	25 00			
	.....	25 00			
	.....	75 00			
	.....	150 00			
	.....	125 00			
	.....	125 00			
	.....	125 00			
	.....	125 00			
	.....	250 72			
	.....	210 00			
	.....	75 00			
	.....	50 00			
	.....	50 00			
	.....	50 00			
	.....	25 00			
	.....	125 00			
	.....	125 00			
	.....	12 50			
	.....	229 16			
	.....	3 75			
25.	.....	25 00			
		(122757 92)			(159361 82)
162					
1890.			1890.		
June 25.	To am't forw'd....	(122759 92)	June 25.	By am't forw'd..	(159361 82)
	.....	58 33			
	.....	50 00			
	.....	125 00			
	.....	10 50			
	.....	50 00			
	.....	25 00			
	.....	275 00			
	.....	50 00			
	.....	125 00			
	.....	93 75			
	.....	50 00			
	.....	45 00			
	End....	8 69			
26.	.....	5 00	26.	.....	2011 88

		5 00			
		68 75			
		75 00			
		75 00			
		75 00			
		19 00			
		60 57			
		30 00			
		75 00			
		10 00			
		62 50			
27.		37 50			
		250 00			
		25 00			
		2 04			
		75 00			
		66 66			
		83 33			
		75 00			
		40 00			
		40 00			
		(124979 54)			(161373 70)
163					
1890.			1890.		
June 27.	To am't forw'd....	(124979 54)	June 27.	By am't forw'd..	(161373 70)
		4 50			
		93 75			
		100 00			
		100 00			
		16 95			
		75 00			
		6 00			
		50 00			
		37 50			
		55 40			
		29 50			
		12 50			
		75 00			
		50 00			
28.		12 50			
		5 00			
		25 00			
		25 00			
		5 00			
		420 00			
		22 92			
		75 00			
		25 00			
		10 00			
		75 00			
		175 78			
		9 00			
		37 50			
		50 00			
		37 50			
		3 50			
30.		200 00			
		60 00			
		75 00			
		75 00			
		(127109 34)			(161373 70)

164

1890.				1890.		
June 30.	To am't forw'd		(127109 34)	June 30.	*To* am't forw'd	(161373 70)
			70 00			
			100 00			
			100 00			
			25 00			
			75 00			
			50 00			
			67 50			
			25 00			
			70 00			
			125 00			
			125 00			
July	1.		750 00	July	1.	3064 51
			75 00			
			70 00			
			30 00			
			20 00			
	2.		75 00		2.	615 36
			20 00			
			25 00			5000 00
			60 50			
			33 33			
			75 00			
			50 00			
			100 00			
			41 66			
			50 00			
			208 33			
			50 00			
			37 67			
			50 00			
			191 67			
			33 50			
			166 66			
			25 00			
			23 00			
			5 00			
		Balance	39845 41			
			(170053 57)			(170053 57)

165

1890.				1890.		
July	3.		75 00	July	3. By bal	39845 41
			125 00			
			15 00			
			600 00			
			151 00			
			125 00			
			100 00			
			200 00			
			15 25			
			15 00			
	5.		25 00			
			21 28			
			100 00		5.	1000 00
			304 09			
			50 00			
			30 00			
			100 00			
			2494 27			
			37 50			
			50 00			
			83 33			

		12 50			
		30 00			
		4 00			
7.		362 92			
		105 00			
		12 50			
		57 80			
		75 00			
		25 00			
		75 00			
		25 00			
		20 00	8.		3653 06
8.		190 83			
		114 85			
		(5827 12)			(44498 47)
166					
1890.			1890.		
July 8.	To am't forw'd	(5827 12)	July 8.	By am't forw'd	(44498 47)
		25 00			
		75 00			
		203 00			
		37 50			
		2 25			
		50 00			
		10 00			
		30 00			
		75 00			
9.		5 00	9.		23231 90
		20 00			
		21 80			
		83 33			
		79 58			
		100 00			
		200 00			
		50 00			
		12 50			
10.		100 00	10.		2558 51
		2 00			
		9 00			8 69
		1 80			676 03
		240 00			
		50 00			
		108 00			
		75 00			
		100 00			
		50 00			
		150 00			
		12 50			
		60 00			
		25 00			
11.		287 00			
		2 50			
		145 00			
		(8324 88)			(70973 60)
167					
1890.			1890.		
July 11.	To am't forw'd	(8324 88)	July 11.	By am't forw'd	(70973 60)
		52 62			
12.		50 00			
		33 33			
		150 00			
		295 00			
		4 56			

		.....	18 63		
		.....	50 00		
		.....	41 66		
		.....	95 00		
		.....	4 38		
		.....	25 00		
	14.	.....	50 00		
		.....	25 00		
		.....	50 00		
		.....	83 33		
		.....	66 66		
		.....	29 92		
		.....	55 40		
		.....	121 00		
		.....	305 00		
		.....	154 00		
		.....	50 00		
	15.	.....	118 87		
		.....	11 00		
		.....	136 52		
		.....	16 66		
		.....	166 00		
		.....	50 00		
		.....	25 00		
		.....	50 00		
		.....	117 00		
		.....	58 75		
		.....	75 00		
	16.	.....	2993 12		
168			(13953 29)		(70973 60)
1890.				1890.	
July	16.	By am't forw'd....	(13953 29)	July 16. By am't forw'd...	(70973 60)
		.....	997 71		
		.....	10 00		
		.....	114 00		
	17.	.....	75 00		
		.....	25 00	17.	1582 94
		.....	4 98		
		.....	913 40		
		.....	75 00		
		.....	118 12		
		.....	95 00		
		.....	2 48		
	18.	.....	25000 00		
		.....	39 63		
		.....	91 00		
		.....	10 00		
		.....	50 00		
		.....	60 00		
		.....	150 00		
		.....	60 00		
	19.	.....	197 51	19.	3968 61
		.....	20 00		
		.....	1203 06		
		.....	594 97		
		.....	50 00		
		.....	5 00		
		.....	25 00		
		.....	193 19		
		.....	24 00		
	21.	.....	8 12		
		.....	43 35		
		.....	88 95		

			29 65				
			410 50				
			5 00				
			300 00				
			(45042 91)				(76520 15)
169							
1890.				1890.			
July	22.	To am't forw'd....	(45042 91)	July	22.	*To* am't forw'd...	(76520 15)
	22.		116 39				
			50 00				
			5 00				
			133 33				
			35 35				
			100 00				
			85 00				
			75 00				
			197 80				
			96 00				
			26 00				
	23.		5 05				
			34 30				
			125 00				
	24.		236 00				
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			309 41				
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			(50557 65)				(77726 71)
170							
1890.				1890.			
July	26.	To am't forw'd....	(50557 65)	July	26.	By am't forw'd...	(77726 71)
			54 00				
			2993 12				
			1480 36				
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	29.		3 00				
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31.	.....	17 50			
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Aug. 1.	.....	178 18	Aug. 1.	.....	2547 82
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171		(59527 89)			(80270 53)
1890.			1890.		
Aug. 1.	To am't forw'd....	(59527 89)	Aug. 1.	By am't forw'd...	(80270 53)
	.....	10 00			
	.....	7 00			
2.	.....	5 00			
	.....	136 69			
	.....	6 86			
	.....	280 00			
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	.....	4 50			
	.....	73 00			
	.....	18 75			
	.....	8 67			
	.....	75 00			
1.	.....	145 00			
	.....	290 00			
	.....	50 00			
4.	.....	56 00			
	.....	75 00			
	.....	11 00			
	.....	166 66			
5.	.....	416 66			
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	.....	125 00			
	.....	78 25			
	.....	537 50			
	.....	33 33			
	.....	190 83			
	.....	25 00			
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	.....	132 50			
	.....	12 00			
		62654 75			81420 57
	Balance.....	18757 82			
		81420 57			81420 57
			1890.		
			Aug. 6.	By balance.	18757 82

(NOTE.—Figures in parentheses, being the headings and footings of the several printed pages of this Exhibit No. 1, December 18, 1894, are not in the original exhibit, but are inserted for convenience of calculation.)

172 COMPL'T'S EX. 2.

Dec. 18, '94.

(See page 123, folio 308.)

(Signed) W. B. Anderson, Spec. Ex.

Copy of Deposit Ticket

Deposited by Domestic & Foreign Miss. Society of the Prot. Epis. Ch. in the Bank of New York National Banking Association.

NEW YORK, *June* 20, 1890.

	Dollars.	Cents.
Pa.	19	92
Bills, 1	7	50
Check, 61	133	00
Pa.	158	57
S. C.	3	75
Pa.	25	00
33	32	40
Pa.	21	60
61	234	00
54	124	00
O.	61	10
12	52	21
Pa.	13	50
—	1	38
65	10	25
Ct	4	20
Pa.	15,577	54
Min.	41	03
15	19	31
	$16,540	26

COMPLAINANT'S EXHIBIT NO. 3.

December 18, 1894.

(See page 131, folio 337.)

Copy of 2d Letter of Arthur M. Burton to Geo. Bliss, Treas.

PHILADELPHIA, *July* 30, 1890.

George Bliss, Esq., treasurer.

DEAR SIR: Since I wrote you under date of July 17th, 1890, respecting the payment made by Henry C. Thompson, $15,577.54, I have learned that the check was dated the same day and drawn immediately after Mr. Holly handed him his check for $12,000. Some other facts have also come to my knowledge which lead me to the belief that the funds belonging to the estate of James Saul,

dec'd, which were awarded to your society, may also be traced
steps are promptly taken in that direction. Mr. Holly's money
be so clearly identified as to render good his right of reclam
173 tion from the Domestic and Foreign Missionary Society
which you are the treasurer, and therefore I make the s
gestion as to tracing the funds belonging to the estate of Dr. S
so that your society may also be saved from loss as far as pract
ble. I have written this much to hand you tomorrow when I
at your office, if I should meet you, or to leave for you in ca
should fail to see you.

Yours very respectfully & truly,

(Signed) ARTHUR M. BURTON,
Att'y for James Holly

COMPLAINANT'S EXHIBIT No. 8.

April 25, 1896.

(Page 133, folio 348.)

Copy of Record of Attachment Proceedings.

C. P. No. 4, June Term, 1890. No. 764.

A. M. BURTON.	JAMES HOLLY	Att. under act of M'ch 17, 1869.
		Exit July 17, 1890.
764.	*vs.*	Ret. 1 Mon., Aug., 1890.
W. H. Price for the Union Trust Co., gar., July 18, 1890.	HENRY C. THOMPSON.	Att. as commanded and n
	July 17, 1890, statement filed.	known to Bank of North A
J. G. Johnson for Real Est. Title Ins. & Trust Co., gar., Oct. 8, '90.	July 15, 1891, *narr.* filed.	ica, Union Trust Co., The
		Est. Title Ins. & Trust Co
		Henry C. Thompson, Jr., indi
		ually, garnishees, & to Henry
		Thompson, Jr., assignee for
		benefit of creditors of Henry
		Thompson, gar. & *nihil habet* a
		def't.
		Feb. 3, 1894, rule to dissolve
		tachment as to Henry C. Tho
		son, Jr., assignee.
Henry W. Hall for Henry C. Thompson, individually, and as assignee for benefit of creditors of Henry C. Thompson, garnishee, M'ch 22, 1893.	Feb'y 18, 1894, plea of gar. Henry C. Thompson, Jr., assignee, &c., filed.	*Eo die*, att'd filed.
		Feb'y 17, 1894, rule discharged.
		Ap'l 14, 1894, leave granted to
		continue this suit upon paym
		of costs and a counsel fee of $1
		to each of the garnishees
		have entered their appearance
		counsel in the cause.
		Eo die, att'd filed.

The above suit is discontinued.

ARTHUR M. BURTON,
Plaintiff's Attorney

Garnishee's attorney's and prothonotary's costs paid.

Attest: C. B. ROBERTS, *Dep. Pro.*

Pro. p'd.

April 28, '94.

174 C. P. No. —, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } No. —.

Issue attachment against the above defendant as required by the act of March 17, 1869 (P. L. 1869, p. 8), as amended by the act of May 24, 1887.

Returnable *sec. leg.*

Bail twenty-four thousand dollars.

($24,000.) ARTHUR M. BURTON,
Att'y for Pl'ff.

July 17, 1890.

To the prothonotary of C. C. P. of Philada. Co.

Endorsed: 764. June, 1890. C. P. No. 4. Holly *vs.* Thompson. Precipe for att. Filed 17th July, 1890. C. B. Roberts, proth'y. A. M. Burton, pro pl'ff.

175 C. P. No. —, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } No. —.

CITY OF PHILADELPHIA, *ss:*

James Holly, the plaintiff above named, being duly sworn according to law, deposes and says: That Henry C. Thompson, the defendant above named, is justly indebted to him, the said plaintiff, in a sum exceeding one hundred dollars, the nature and amount of which is as follows, viz: On the nineteenth day of June, A. D. 1890, at the special instance and request of the defendant, the plaintiff deposited with him, the said defendant, as the attorney for him, the said plaintiff, the sum of twelve thousand dollars to be applied by him, the said defendant, to the payment of the purchase-money of the house and lot of ground, No. 643 North Fifteenth street, in the city of Philadelphia, which the said plaintiff had contracted to purchase at a public sale of said premises made by James A. Freeman & Co., auctioneers, on the fourteenth day of May, 1890, together with his receipt for two hundred dollars, which said plaintiff paid to said James A. Freeman & Co. on said day as earnest money for the purchase of said property; that said plaintiff had employed said defendant, Henry C. Thompson, as his attorney to make searches for him and examine the title and obtain for him a conveyance of the same in fee-simple, and in accordance therewith had, at the request of said defendant, deposited with him for the purpose of consummating the said sale on the execution of the deed the amount of money aforesaid. Annexed hereto is a copy of the receipt which was given by said defendant to the plaintiff for the sum of twelve thousand dollars so deposited with him as afore-

said, and also a copy of the check which said plaintiff gave to Henry C. Thompson at the time said receipt was given by said Thompson to the plaintiff. That on or about the twenty-first day of June, A. D. 1890, the said defendant wrongfully and fraudulently appropriated the said money to his own use in the following manner, viz: The said defendant deposited the said check with
176 the Union Trust Company for collection and the said check was paid to the said company on the same day and credited to said Thompson in his individual account; and on the twenty-first day of June following the said defendant wrongfully and fraudulently drew out of the said The Union Trust Company, the entire amount of the said deposit with the exception of about nine hundred and eighty-five dollars in checks that were drawn by him, the said defendant, and that he has since that time drawn out all the balance of said moneys except about one hundred dollars, and all of said moneys have been drawn by said defendant, Henry C. Thompson, without the knowledge or consent of this plaintiff for other purposes than that for which said moneys were deposited with him, and without appropriating any part of said moneys to the uses and purposes for which said defendant received the same. Plaintiff is informed and believes that said Henry C. Thompson left the city of Philadelphia and State of Pennsylvania on or about the tenth day of July last past and has not since returned thereto, and it has only been since said defendant left the city as aforesaid that plaintiff became acquainted with the facts herein set forth. And the plaintiff saith that the said defendant has fraudulently assigned, disposed of and removed the said money of the said plaintiff and other moneys which he, the said defendant, had on deposit with the Union Trust Company aforesaid to the amount of fifteen thousand dollars and upwards, with the intent to defraud his creditors and especially this plaintiff, and that he, the said defendant, fraudulently contracted the debt and incurred the obligation for which this claim is made.

And the plaintiff therefore prays that an attachment shall issue against said defendant under the act of March 17, 1869, as amended by the act of May 24, 1887, in such case made and provided.

$12,000.

(Signed) JAMES HOLLY.

Sworn and subscribed before me, this nineteenth day of July, A. D. 1890.

C. B. ROBERTS,
Com. of Bail.

177 *Copy of Check.*

No. —. PHILADELPHIA, *June* 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co.

Pay to Henry C. Thompson, att'y or order twelve thousand dollars.

(Signed) JAMES HOLLY.

(Stamped on the face with the following words:)

"The Fidelity Insurance, Trust
Paid
Jun- 19, 1890.
and Safe Deposit Co."

(Endorsed on back as follows:) "For deposit. H. C. Thompson, att'y. For collection the Union Trust Company, Philadelphia. M. S. Stokes, treasurer.

Copy of Receipt.

PHILADELPHIA, *June* 19, 1890.

Received from James Holly, twelve thousand dollars, & J. A. Freeman's receipt for $200 to be applied to purchasing house No. 643 North Fifteenth street.

$12,000.

(Signed) H. C. THOMPSON.

Copy of Endorsement.

No. 764. June term, 1890, C. P. No. 4. James Holly *vs.* Henry C. Thompson. Filed 17 Jul-, 1890. C. B. Roberts, pro proth'y.

178 Common Pleas, No. 4, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON, Def't, and THE UNION TRUST Company, Garnishee. } No. 764.

Please enter my appearance for The Union Trust Company, garnishee in the above-stated case.

WM. HENRY PRICE.

July 18, 1890.

To the prothonotary.

Endorsed: 764. June, 1890. Holly *vs.* Thompson. C. P. No. 4. Order for appearance for The Union Trust Company, garnishee. Filed July 18, 1890. Wm. Henry Price. J. Kenderdine, pro proth'y.

179 C. P. No. 4, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } 764.

SIR: Enter my appearance for The Real Estate, Title Insurance and Trust Company of Philadelphia, garnishee.

JOHN G. JOHNSON,
Attorney for the Real Estate Title, Insurance and Trust Company of Philadelphia.

Endorsed: 764. June term, 1890, C. P. No. 4. Holly *vs.* Thompson. Order for appearance for The Real Estate, Title Insurance and Trust Company of Philadelphia, garnishee. Filed Oct. 8, 1890. P. H. White, pro proth'y. Jno. G. Johnson.

180 COUNTY OF PHILADELPHIA, *ss:*

Attachment, Act of 1869.

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

Whereas, it is proven by the affidavit of James Holly that Henry C. Thompson defendant is justly indebted to James Holly plaintiff in the sum of twelve thousand dollars, and — cents, the nature and amount of said indebtedness being set forth in said affidavit filed in this cause; and that the said defendant, Henry C. Thompson, fraudulently contracted the debt and incurred the obligation for which this claim is made, therefore we command you, that you attach the said defendant by so much of the moneys, interest in any public or corporate stocks, rights in action, evidences of debt or other property, of the said defendant not exempt by law from sale upon execution, as will be sufficient to pay the said debt demanded with costs; so that the said defendant be and appear before our court of common pleas No. 4 of the county of Philadelphia, to be holden at Philadelphia, in and for said county, on the first Monday of August next, to answer the said plaintiff of a plea of trespass on the case, &c.

And in case such moneys, interest in any public or corporate stocks, rights in action, evidences of debt or other property, of the said defendant shall be found in the hands or possession of any person, persons or corporation, other than the said defendant, then we also command you, that you summon such person, persons or corporation, in whose hands or possession the said property may be attached as garnishee or garnishees, so that they and every of them be and appear before the said court, at the day and place aforesaid, to answer what shall be objected against them, and abide the judgment of the court therein. And how you shall have executed this writ make known to the said court, at the day and place aforesaid. And have you then — there this writ.

181 Witness the Honorable M. Russell Thayer, president judge of our said court, at Philadelphia, the seventeenth day of July, in the year of our Lord one thousand eight hundred and ninety.

(Signed) C. B. ROBERTS,
Dep. Prothonotary.

Copy of Endorsement.

764. June term, 1890, court of common pleas No. 4. James Holly *vs.* Henry C. Thompson. Attachment, 1869. Sheriff's office, July 17, 1890, 1.05 o'clock p. m. A. M. Burton.

Copy of Sheriff's Returns Attached to Foregoing Writ.

Attached as within commanded July 17, 1890, and made known to Bank of North America garnishees by giving July 17, 1890, at 1 o'clock and 55 minutes p. m., a true and attested copy of the within writ to J. A. Michener, president of said bank, and making known to him the contents thereof.

Also, made known to The Union Trust Company, garnishee, by giving July 17, 1890, at 2 o'clock and 5 minutes p. m., a like copy to M. S. Stokes, treasurer of said company, and making known to him the contents thereof.

Also, made known to The Real Estate Title Insurance and Trust Company, garnishee, by giving July 17, 1890, at 2 o'clock and 15 minutes p. m., a like copy to C. D. Ritchie, president of said company, and making known to him the contents thereof.

182 Also, made known to Henry C. Thompson, Jr., individually garnishee, by giving to him July 17, 1890, at 2 o'clock and 40 minutes p. m., a like copy, and making known to him the contents thereof.

Also, made known to Henry C. Thompson, Jr. (assignee for the benefit of creditors of Henry C. Thompson), garnishee, by giving to him July 19, 1890, at 3 o'clock and 20 minutes p. m., a like copy, and making known to him the contents thereof, and *nihil habet* as to defendant.

No answers—

(Signed) C. H. KRUMBHAAR, *Sheriff.*

183 C. P. No. 4, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } No. 764.

COUNTY OF PHILADELPHIA, *ss:*

Henry C. Thompson was summoned to answer the plaintiff James Holly, of a plea of assumpsit, and thereupon the said plaintiff, by Arthur M. Burton, Esq, his attorney, complains:

For that whereas heretofore, to wit, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and ninety, the said plaintiff had retained and employed the said defendant, he being an attorney-at-law of the city and county of Philadelphia, as his, the said plaintiff's attorney, to examine the title to a certain lot of ground with the building thereon erected, No. 643 North 15th street, to wit, at the county aforesaid, and to make searches for him, the said plaintiff, with a view of procuring for him, the said plaintiff, a conveyance of the said lot of ground and premises on the payment by the said plaintiff to the vendors of the said property of the purchase money therefor. And the plaintiff, in fact, saith that the said defendant undertook and then and there faithfully promised the said plaintiff, that he would make such ex-

aminations and procure such title for him, in accordance with his retainer aforesaid, and the said plaintiff, in pursuance of the same, at the special instance and request of the said defendant, did on the day and year aforesaid, to wit, at the county aforesaid, deposit with the said defendant the sum of twelve thousand dollars to be applied by said defendant to the payment of the purchase-money of the said premises, and the said Henry C. Thompson then and there faithfully undertook and promised that he would apply the same sum of twelve thousand dollars to the completion of the purchase of said premises, No. 643 N. 15th street, and the procuring of a conveyance of the same to the plaintiff aforesaid. And the plaintiff saith
184 that the said defendant did on or about the twenty-first day of June, A. D. 1890, wrongfully and fraudulently appropriate the said sum of twelve thousand dollars to his own use in the following manner, to wit, that is to say: The said defendant deposited the said money with the Union Trust Company, a corporation of the State of Pennsylvania, to his individual account, and the said defendant did thereupon, to wit, on the day and year aforesaid, wrongfully and fraudulently draw out of the said Union Trust Company the said sum of twelve thousand dollars, and appropriate the same to other purposes than those for which the said moneys were deposited with him, the said defendant, and without appropriating any part of said moneys to the uses and purposes for which he had received the same from the said plaintiff.

And for that whereas, to wit, on the day and year aforesaid, at the county aforesaid, the said defendant was indebted to the said plaintiff in the sum of twenty thousand dollars for divers moneys advanced to the said defendant, to wit, the sum of twenty thousand dollars, to wit, at the county aforesaid, at the special instance and request of the said defendant to be applied by the said defendant to the payment of the purchase-money for a certain house and lot of ground No. 643 N. 16th street, which the said defendant undertook and faithfully promised to apply to the purposes for which the said money was deposited with him and the said defendant, to wit: on the day and year aforesaid, at the county aforesaid, which said moneys the said defendant wrongfully and fraudulently appropriated to his own use and did not apply to the purchase of said premises, as he, said defendant, had promised to do, but wrongfully and fraudulently appropriated the same to his own use, and failed to apply the said moneys or any moneys of his own to the purchase of the said premises, and has neglected and refused and still doth refuse so to do. Whereby the said defendant became liable to pay to the said plaintiff the said sum of twenty thousand dollars, to wit: at the county aforesaid.

And also for that whereas the said defendant afterwards to wit, on the day and year aforesaid and, to wit, at the county aforesaid, in consideration that the said plaintiff had then and there
185 deposited with said defendant a certain large sum of money, to wit, the sum of twelve thousand dollars, to be applied by the said defendant to the purchase of a certain house and lot of ground, No. 643 North 15th street, he the said defendant made and

executed to the said plaintiff a certain instrument in writing in the words and figures following, to wit:

PHILADELPHIA, *June* 19, 1890.

Received from James Holly twelve thousand dollars & J. A. Freeman's receipt for $200 to be applied to purchasing house No. 643 N. 15th street.

(Signed) H. C. THOMPSON.

Whereby the said defendant promised the said plaintiff to apply the said moneys aforesaid to the purchase of the said house No. 643 N. 15th street, according to the tenor and effect and true intent and meaning of said instrument of writing. Nevertheless the said defendant hath not applied the said moneys to the purchase of the said house, No. 643 N. 16th street, but hath hitherto wholly neglected and refused to apply the said moneys to the purchase of said house according to his said promise and the true intent and meaning of his said agreement and still doth refuse, to wit, at the county aforesaid.

And also for that whereas the said defendant, to wit, on the day and year aforesaid, to wit, at the county aforesaid, was indebted to the said plaintiff in the sum of fifty thousand dollars for money had and received by said defendant to and for the use of said plaintiff.

And being so indebted, the said defendant in consideration thereof afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and faithfully promised the said plaintiff to pay said sum of money in this count mentioned when he the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant not regarding his said several promises and undertakings, has not paid the said several sums of money, or any of them, or any part thereof, to the said plain-
186 tiff, or to any person for him or for his use, although often requested so to do; but the said defendant hath hitherto neglected and refused and still doth neglect and refuse so to do to the damage of the said plaintiff of fifty thousand dollars, and therefore he brings suit, &c.

(Signed) ARTHUR M. BURTON, *Pl'ff's Att'y.*

July 15, 1891.

Copy of Endorsement.

764. June term, 1890, C. P. No. 4. James Holly *vs.* Henry C. Thompson. *Narr.* Filed July 15, 1891. J. Kenderdine, pro proth'y. A. M. Burton, for pl'ff.

187 C. P. 4, June, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } 764.

Enter my appearance for H. C. Thompson, Jr., individually and as assignee for benefit of creditors of H. C. Thompson, garnishee.

(Signed) HENRY W. HALL.

Mar. 22, 1893.

Copy of Endorsement.

764. C. P. 4, J., '90. Holly *vs.* Thompson, def't, *et al.*, garnishee. Appearance for H. C. Thompson, Jr., *et al.*, garnishee. Filed Mar. 28, 1893. J. Kenderdine, pro proth'y. H. W. Hall.

188 In the Court of Common Pleas No. 4 for the County of Philadelphia, of June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON, Defendant, and HENRY C. THOMPSON, Jr., Assignee for the Benefit of the Creditors of the said Henry C. Thompson, *et al.*, Garnishees. } No. 764.

The petition of Henry C. Thompson, Jr., assignee for the benefit of the creditors of Henry C. Thompson, respectfully represents:

That Henry C. Thompson by deed poll under his hand and seal bearing date the 17th day of July, A. D. 1890, and duly recorded in the office for the recording of deed-, &c., in and for the city and county of Philadelphia on the same day at 12.39 o'clock p. m. in Deed Book G. G. P. No. 667, page 76 &c. granted and conveyed all his estate, real; personal and mixed unto your petitioner in fee in trust for the benefit of the creditors of the said Henry C. Thompson; that your petitioner accepted the said trust and gave bond in the amount required by the court of common pleas No. 2 of this county duly approved by said court as appears by the records thereof to June term, 1890, No. 911; that on the 22nd day of December, A. D. 1892, your petitioner filed the first and final account of his trust in said court of common pleas No. 2 showing a balance in his hands of $3,065.46; that the said court duly referred the same unto John V. Ripperger, Esq., as auditor to report distribution of the said balance and the said auditor has taken proof of all claims presented to him, has closed the audit, has prepared his report and has given notice that he will file the said report on the 14th day of No-
189 vember, A. D. 1893; that by said report it appears that the net balance for distribution after payment of costs, auditor's fees, expenses &c. is $2,525.46, and that the gross amount of claims proved is $63,031.00, the dividend being $4\frac{1}{2}$ per centum; that your petitioner has collected and converted into money all the estate and assets of his assignor which are capable of being collected and converted and that he does not believe he will collect over two hundred and fifty dollars more from any source whatever.

That on the 17th day of July, A. D. 1890, (the same day on which the assignment was made to your petitioner as aforesaid) James Holly caused to be issued out of your honorable court to June term, 1890, No. 764, an attachment under the act of assembly approved the 17th day of March, A. D. 1869, entitled "An act relative to fraudulent debtors," against the said Henry C. Thompson as defendant and has summoned *inter alia* your petitioner as assignee as aforesaid as garnishee; that as appears by the record of said proceeding on July 17, 1890, a statement was filed, and on July 15,

1891, a *narr.* was filed, but that no other or further steps have been taken by the said James Holly against the defendant or any of the garnishees although no appearance has been entered for the said defendant; that the writ of attachment aforesaid as appears by endorsement stamped thereon was delivered to the sheriff for service upon the defendant and garnishee on the 17th day of July, 1890, at 1.05 o'clock p. m. and that the same was served on your petitioner by the sheriff on the same day at about 2 o'clock p. m. That the said plaintiff James Holly has appeared before the said auditor, but has refused to present any claim or submit any proof of claim to the said auditor; that by reason of the above-mentioned attachment your petitioner has requested the said auditor to delay the filing of his report, which request has been complied with, and that the creditors who have proved their claims and to whom awards have been made have requested the said auditor to file his report and your petitioner to pay them the amounts of their awards.

Wherefore your petitioner prays your honorable court for
190 a rule on the said James Holly to show cause why the attachment aforesaid should not be dissolved so far as your petitioner as assignee aforesaid is concerned and so as to permit distribution to be made of the fund in the hands of your petitioner in accordance with the report of the auditor as above mentioned.

And he will ever pray, &c.

(Signed) H. C. THOMPSON, JR.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

Henry C. Thompson, Jr., being duly sworn according to law, says that the statements contained in the foregoing petition are true to the best of his knowledge and belief.

(Signed) H. C. THOMPSON, JR.

Sworn and subscribed before me this 26th day of January, 1894.

(Signed) HENRY S. PARMALEE,
[SEAL.] *Notary Public.*

Copy of Endorsement.

C. P. No. 4. 764. June term, 1890. Holly *vs.* Thompson. Petition for rule to dissolve attachment as to Henry C. Thompson, Jr., assignee. And now, February 3, 1894, on presentation of within petition and on motion of Emil Rosenberger, for petitioner, rule is granted as in said petition prayed. Returnable Saturday, February 10, 1894. Filed Feb'y 3, 1894. (Signed) C. H. W. Emil Rosenberger.

191 C. P. No. 4, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON, Defendant, and HENRY C. THOMPSON, Jr., Assignee for the Benefit of the Creditors of the said Henry C. Thompson *et al.*, Garnishees. } No. 76

SIR: The above-named garnishee, Henry C. Thompson, Jr., a signee for the benefit of the creditors of Henry C. Thompson, plea *nulla bona*.

(Signed) DWIGHT M. LOWREY,
Attorney for Garnishee.

To proth'y C. P.

Copy of Endorsement.

764. June term, 1890, C. P. No. 4. Holly *vs.* Thompson. Pl of garnishee, Henry C. Thompson, Jr., assignee for the benefit the creditors of Henry C. Thompson. Filed Feb. 18, 1894. Kenderdine, pro proth'y. Lowrey.

192 C. P. No. 4, June Term, 1890.

JAMES HOLLY
vs.
HENRY C. THOMPSON. } No. 764. Attachment under the Act March 17, 1869.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

James Holly, being duly sworn, deposes and says as follow That he is the plaintiff in the above entitled suit; that the abo writ of attachment in the above proceeding was served upon T Bank of North America, The Union Trust Company, The R Estate Title Insurance and Trust Company, Henry C. Thompso Jr., individually, and Henry C. Thompson, Jr., assignee for t benefit of creditors of Henry C. Thompson, as garnishees, but t defendant was not served, and no judgment has been entered said cause. That The Union Trust Company and The Real Est Title Insurance and Trust Company are the only garnishees w have entered their appearance in said attachment suit. That up information received after the service of said attachment as afo said, this deponent commenced proceedings by bill in equity agai said Henry C. Thompson and other parties therein named in t circuit court of the United States for the southern district of N York, for the recovery of the moneys which had been fraudulen obtained by said defendant from plaintiff, as is set forth in the s plaintiff's affidavit upon which said attachment proceedings w issued, and which said moneys this deponent had been inform had been wrongfully transferred by said Thompson to the oth parties named in said bill in equity, which said proceedings equity are still pending and undetermined in said circuit court the United States for the southern district of New York. That t

deponent is advised by his counsel that the further prosecution of the present attachment proceedings in Pennsylvania is likely to prejudice the prosecution of his claim to recover these moneys from the parties who hold the same in the State of New York.

193 Your deponent therefore asks leave to discontinue said attachment upon payment of the costs of discontinuance, including the fees to the garnishees who have appeared by counsel in said attachment suit.

(Signed) JAMES HOLLY.

Sworn and subscribed to before me this 13th day of April, A. D. 1894.

(Signed) JAY R. GRIER,
[SEAL.] *Notary Public.*

Foreign Certificate.

THE COMMONWEALTH OF PENNSYLVANIA, } *ss:*
County of Philadelphia, }

I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three and four, respectively, of the county of Philadelphia, do certify, that the foregoing is a true copy of the whole record of the cause wherein James Holly — plaintiff and Henry C. Thompson defendant; of June term, 1890 number 764 as full, entire and complete as the same remains on file in court of common pleas No. 4 of the county of Philadelphia, in the case above stated.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, this 25th day of February in the year of our Lord, one thousand eight hundred and ninety-six (1896).

WILLIAM B. MANN,
Prothonotary.

194 COUNTY OF PHILADELPHIA, *ss:*

I, M. Russell Thayer, presiding judge of the court of common pleas No. 4 for the county of Philadelphia, do certify, that the foregoing record, certificate and attestation, made by William B. Mann, Esquire, prothonotary of the said court, whose name is thereunto subscribed and seal of the office affixed, are in due form, and made by the proper officer.

In testimony whereof, I have hereunto set my hand, this 25th day of February in the year of our Lord, one thousand eight hundred and ninety-six (1896).

M. RUSSELL THAYER,
President Judge.

COUNTY OF PHILADELPHIA, *ss:*

I, William B. Mann, Esquire, prothonotary of the several courts of common pleas, numbers one, two, three and four, respectively, for the county of Philadelphia, do certify, that the Honorable M. Russell Thayer, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof,

and still is, presiding judge of the court of common pleas No. 4 for the county of Philadelphia, duly commissioned and sworn; to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature, as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said courts, this 25th day of February, in the year of our Lord, one thousand eight hundred and ninety-six (1896).

WILLIAM B. MANN,
Prothonotary.

195 COMPLAINANT'S EXHIBIT No. 9.

Feb. 27, 1895.

(See pages 136 & 137, folios 356 to 363.)

1890.	Checks.	Deposits & daily balances.	Deposits of each day.	Balance.
June 2	.....	.....	65945 31	.....
" 2	452 77	73616 72	7671 41	.....
" 3	4926 28	80906 99	7743 04	73163 95
" 4	1316 16	.....	.....	.....
" 5	2821 17	.....	.....	.....
" 6	2696 20	75282 67	3439 29	71843 38
" 7	37323 89	95416 80	15000 00	72586 47
" 7	.....	.....	1302 80	.....
" 7	.....	.....	6527 53	.....
" 9	4369 80	83092 91	25000 00	58092 91
" 10	3133 93	.....	.....	78723 11
" 11	2058 15	*78723 11	25 32	.....
" 12	2393 22	78155 47	4599 12	73531 03
" 13, 16	31759 09	77169 89	1407 64	75762 25
" 17	2736 98	47208 76	1797 96	45410 80
" 18, 19	1401 17	44971 00	499 22	44471 78
" 20	.....	.....	16540 26	43569 83
" 21	5617 44	60189 62	79 53	.....
" 23, 25	20717 94	56355 57	1783 39	54572 18
" 26, 30	4217 65	37649 51	2011 88	35637 63
July 1	945 00	36496 37	3064 51	33431 86
" 2	1321 32	41166 73	5000 00	35551 37
" 2	.....	.....	615 36	.....
" 3	1421 25	.....	.....	39845 41
" 5	4100 19	39424 16	1000 00	38424 16
" 8	813 43	38977 03	3653 06	35323 97
" 9	572 21	61395 50	23231 90	38163 60
" 10, 11	2237 98	63390 49	2558 51	60823 29
" 12	.....	.....	8 69	.....
" 14, 16	5929 94	61828 54	676 03	61152 51
" 17, 18	26769 61	57481 54	1582 94	55898 60
" 19	6054 46	34680 54	3968 61	30711 93
" 26	11217 64	29827 64	1201 56	28626 08
Aug. 1, 4	1946 97	21157 82	2547 82	18610 00
Aug. 5	1591 07	20356 89	1146 04	19210 85
	.....	.....	.....	18765 82

* This was erroneously entered in exhibit as 7872 11.

196 Circuit Court of United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE Protestant Episcopal Church in the United States of America and E. Walter Roberts.

Testimony on the part of the respondents, taken before William B. Anderson, special examiner appointed by an order of the court dated the sixth day of December, 1894.

Hearing continued, pursuant to agreement, February 26th, 1895, at 2 p. m.

Appearances: Mr. Cephas Brainerd for the complainant; Mr. Herbert Barry for the respondents.

Mr. E. WALTER ROBERTS, being first duly sworn, testified as follows:

By Mr. BARRY:

1 Q. Mr. Roberts, what is your business?

197 A. An assistant treasurer of the Foreign Missionary Society.

2 Q. You have been for how long?

A. About seventeen years.

3 Q. Do you have to do with the bank account of the society, the drawing of checks and keeping accounts of its expenses?

A. Yes, sir.

4 Q. That is, the actual practical book-keeping and care of the accounts is watched over by you?

A. Yes, supervised by me.

5 Q. Have you prepared, at my request, a statement showing all of the checks drawn by the society from June 1st to August 1st, 1890?

A. Yes.

6 Q. Is that the statement (handing witness a paper)?

A. Yes.

7 Q. Is it correct?

A. Yes.

8 Q. Were the checks which are there referred to drawn to the order of the persons there named, and for the amounts there set forth, and for the purposes there stated?

A. Yes.

9 Q. And delivered on or about the dates that are mentioned?

A. Yes.

10 Q. Was that made up from your check books?

A. Made up from the check books; yes.

By Mr. BRAINERD:

11 X Q. What is the third column in this paper; how is it made; where do you get it?

A. Made from the stub of the check book.

12 X Q. Is it the whole of the writing upon the stub of the check book, and only that?

A. It is only that.

13 X Q. And it is the whole of it?

A. Yes.

I do not object to this paper on the ground that the check books are not produced, but I object to the admission of this as no evidence in this case tending to show the appropriation of any specific moneys to any specific object, and as being simply a memorandum made by a book-keeper for the convenience of the defendant,
198 and as having no probative force as respects the plaintiff in this action.

Offered in evidence; received and marked for identification Respondents' Exhibit A of this date, consisting of twenty-five pages.

By Mr. BARRY:

14 Q. Mr. Roberts, this statement which has just been marked Exhibit A for identification is simply a copy of the entries upon the stubs in the check book of the society, is it not?

A. It is.

15 Q. That is, that the first entry, Robert A. Yager, D. D., June 2, specific item for C. P. A. $50, that all appears on the stub of the check book?

A. It all appears there.

16 Q. So that it is simply a copy of the stub of the check book?

A. It is essentially a copy, taken in connection with the head lines.

17 Q. Who made these entries?

A. They were largely made by the book-keeper, occasionally by other clerks, but all verified by me before the checks were signed.

18 Q. And all the checks were signed by you?

A. All signed by me.

19 Q. And you saw the entries on the stubs in the check book?

A. I read every one before signing the check.

20 Q. Now, Mr. Roberts, were the checks drawn by the society signed by you for the society, and sent out between the first of June, 1890, and the first of August, 1890, to the persons named in this statement, the respective checks being for the amounts set forth in this statement?

A. They were.

21 Q. And for the purposes and accounts specified in that statement?

A. They were.

22 Q. Can you testify from your personal recollection that that is the fact?

A. Yes.

23 Q. Now, Mr. Roberts, have you prepared for me a statement subdividing and arranging the items of this statement so as to group

them under the four respective heads of Checks drawn for
199 domestic missions, Checks drawn for foreign missions, Checks drawn for colored missions and Checks drawn for central expense account?

A. I have.

24 Q. Are these the statements (handing witness a paper)?

A. Those are the statements.

25 Q. These are prepared by you?

A. They are prepared under my direction.

26 Q. You have examined them?

A. I have examined them.

27 Q. And they are correct?

A. They have been verified.

28 Q. And they are correct?

A. I believe them to be correct.

Received and marked for identification Exhibits B, C, D, E.

29 Q. Take Exhibit B for identification; was that first item, which reads June 9, National Shoe & Leather bank, Washington, account Bishop Paddock, $200, a correct description of a check which was drawn on that date for domestic missions?

A. It was.

30 Q. And that check was sent out?

A. That check was sent out.

31 Q. Is the same true as to each of these other items in this statement?

A. Yes.

32 Q. Take Exhibit C for identification; the first item is June 2, Rev. B. W. Timothy, colored account $100; does that statement indicate that a check was drawn and sent out on that day to that person and for the account of colored missions?

A. It does.

33 Q. And is the same true as to each of the other items in this statement?

A. It is.

34 Q. Take Exhibit D for identification; the first item is June 2, Rev. W. B. Golding, himself, salary June, $229.16; is that a correct statement of the check which was drawn and sent out on that date for foreign missions?

A. It is.

35 Q. Is the same true as to each of these other items in this statement?

A. Yes.

200 36 Q. Take Exhibit E, which purports to be a statement of checks drawn for the expenses of the Central expense. It is entitled Checks drawn Central expense, paid one-half for account of domestic missions and one-half for account of foreign missions; what does that mean? Is that in pursuance of a resolution——

I object to the witness stating the contents of a resolution of the board. That is only to be proved by the resolution itself.

A. Pursuant to the resolution of the board it has been the custom for many years to appropriate the Central expense one-half from funds received for domestic missions and one-half from funds received for foreign missions.

37 Q. And is the same true of this statement, which you have stated to be the fact with reference to the other Exhibits B, C, D, that each item in this statement represents a check which was drawn to the person there named, in the amount there named and for the purpose there specified?

A. It is.

38 Q. How were you appointed an officer of the society?

A. By election of the board annually.

39 Q. And you had been elected in the year 1890 as assistant treasurer?

A. Yes, sir.

40 Q. And the board had given you the power to draw and sign checks of the society?

A. Yes.

41 Q. And were these checks drawn and signed pursuant to that authority?

A. Yes.

42 Q. And were they sent out and delivered and paid pursuant to that authority?

A. They were.

43 Q. Was the payment for these particular purposes an appropriation by the board?

Objected to on the ground that the action of the board must be proved by its votes, and resolutions cannot be proved by this witness, who is not shown to be qualified to prove them.

201 44 Q. Were there resolutions passed by the board as to how the money should be appropriated?

Objected to on the ground, first, that it is a legal question, and on the ground, secondly, that the action of the board can only be proved by the resolutions in its minutes, and those must be produced, and that the witness does not appear to be qualified to testify.

45 Q. Is their monthly report submitted to the board?

A. Yes.

46 Q. That shows what moneys have been received during the month and what moneys have been disbursed?

A. Yes.

47 Q. And what is done, does the board act upon that habitually, or prove the report?

A. It is part of the order of the business that the treasurer shall report.

48 Q. And then his report is accepted?

A. Yes; and it then becomes a portion of the minutes.

Hearing adjourned to March 7, 1895, at 2 p. m.

WILLIAM B. ANDERSON,
Special Examiner.

Hearing continued March 7, 1895.
Same appearances.

Rev. JOSHUA KIMBER, being first duly sworn, testified as follows:

By Mr. BARRY:

1 Q. Dr. Kimber, will you state your occupation?
A. I am an associate secretary of the Domestic and Foreign Missionary Society.
2 Q. As such have you the general charge of the actual business operations of the society?
A. As such in fact I keep all the records; I am the custodian of the seal, and I have concurrent power with the general secretary to sign all warrants, and the result is that I sign almost all the warrants.
202 3 Q. The correspondence of the society all passes through your hands?
A. Almost all of it; yes, sir.
4 Q. That addressed to the society?
A. Yes, sir.
5 Q. You are acquainted with all of its operations?
A. Yes, sir.
6 Q. Both domestic and foreign?
A. Yes, sir.
7 Q. Are you not in general the manager in charge of the general office?
A. As a matter of fact I am, yes.
8 Q. The head officer in the actual management of affairs?
A. Yes, sir, every-day affairs. The general secretary is my superior officer.
9 Q. Subject to the resolutions of the board?
A. Yes, sir.
10 Q. Will you describe briefly the organization of the society?
A. The society is composed of all the members of the church. It, by its representatives in general convention, a board of managers, has all the corporate powers of the society in its hands, and carries on the business.

The witness produces documents which he states are the act of incorporation, constitution and by-laws passed by the legislature of the State of New York May 13, 1846, as they existed in 1890.

The defendant offers in evidence the act of incorporation and any amendment thereof that there may be, and then the constitution, and then the by-laws of the board, being pages 258 to 265, inclusive, from the volume of proceedings, 1890.

Complainant's counsel does not object to the use of the printed book at all, but reserves the right to state objections after he shall have had an opportunity to examine it, and interpose objections at the next hearing.

Received and marked Respondents' Exhibit F of 1895.

203 11 Q. You are, I think you said, the recording secretary?

A. It is my duty to keep the minutes of the society.

12 Q. Have you the minute books of the society?

A. Yes, they are here.

13 Q. And you now produce them?

A. Yes, they are here.

14 Q. Will you state what are the resolutions of the board under which general appropriations for missionary purposes are made by the society?

A. Well, the resolutions are adopted annually; annual resolutions making appropriations for the several missions at home and abroad. There may be one or more resolutions at different years.

By Mr. BRAINERD:

15 X Q. Adopted by the board of managers?

A. Yes, sir.

By Mr. BARRY:

16 Q. There have been put in evidence the record of the various checks drawn by the society during the months of June and July, 1890. Can you state by virtue of what authority those were drawn?

Complainant's counsel objects on the ground that it appears that there are resolutions under which the officers proceed in making payments, and those resolutions must be produced.

17 Q. Will you read me the resolutions under which those payments and appropriations were made? What is the book you produce?

A. I have the minute book which contains the action of the board of managers taken between September 1, 1888, and September 1, 1889. The book is endorsed "Proceedings board of managers, volume 7."

18 Q. Will you read from that the resolution to which you refer?

A. There are several resolutions. The first one is Resolved that the appropriations for domestic missions other than for work among the colored people for the fiscal year ending September 1,
204 1890, be and are hereby made according to the schedule at present in force, namely, (then follows the schedule).

The next resolution is an appropriation for foreign missions. The record is that the secretary read a summary of the proposed appropriations for foreign missions, showing also the present schedule and the amount asked for. Following that is the resolution which was adopted: Resolved that the appropriations for foreign missions as proposed in the foregoing schedule, be and hereby are made the appropriations of this board for foreign missions for the fiscal year 1889–'90.

The next resolution is in regard to colored missions, and is as follows: Resolved that this board does hereby appropriate for the first quarter of the coming fiscal year for the work under the charge

of the commission for work among colored people at the annual rate of $20,000.

My statement is subject to this explanation: That this last resolution having been adopted, for three months before it expired the general convention sat as a board of missions, and gave certain instructions with regard to the colored work. At the next meeting of the board, November 12, 1889, the following resolution was adopted: Resolved that the recommendation of the board of missions be complied with, and appropriation be and hereby is made for the work of the commission among colored people at the annual rate of $40,000, exclusive of specials, from December 1, 1889.

On the 10th of June, 1890, the board adopted the following resolution: Resolved that the treasurer be instructed to apply so much of the gross amount received from domestic, foreign and general legacies to September 1, 1890, as may be required toward the appropriations for corresponding work to the same date.

19 Q. During the month of June, 1890, the society received the sum of $15,577.54, in payment of a legacy left to the society
205 by Rev. Dr. Saul, did it not?

A. It received a sum of money; I would not be sure about the figures.

20 Q. On account of the bequest?

A. Yes.

21 Q. Was that one of the receipts to which the resolution of June, 1890, applied?

Objected to as immaterial and incompetent, and on the further ground that it is not within the competency of this witness to state whether there was or was not a sum to which that resolution applied. The question calls for a conclusion of law which this witness is incompetent to draw.

22 Q. State to what that resolution of June 10, 1890, was intended to apply.

Objected to on the ground that the resolution speaks for itself; that it is the action of a board, and that no one member of it, and least of all a secretary, is competent to state anything whatever in regard to the intention of the board in passing a resolution.

23 Q. When did the board meet in 1890?

A. The second Tuesday in every month except July and August.

24 Q. Was that true in the year 1890?

A. Yes.

25 Q. These schedules are an enumeration of the various missions as enumerated under the names foreign missions, domestic missions and colored missions, are they not?

A. Yes, sir.

26 Q. Are the enumerations of missions as specified in the various resolutions which you have already introduced, the several missions which are conducted and aided by the defendant under the several heads domestic missions, foreign missions and missions to colored people?

A. Yes, sir.

27 Q. Is it true or not that the payments specified in Exhibits B, C and D of Feb. 26, 1895, were payments on account of the three missions which you have enumerated, namely, domestic
206 missions, colored missions and foreign missions, and you will please look at the exhibits and see?

A. They were.

28 Q. And those missions are the missions referred to in the resolutions which you have read?

A. They are.

29 Q. And Exhibit E is an enumeration of the payments for office expenses, is it not, generally?

A. Yes, sir.

30 Q. And those were made by authority of the board, were they not?

A. They were, sir.

The witness produces minutes of a special meeting of the board held Sept. 23, 1890.

Counsel for defendants offers in evidence a portion of the minutes of the treasurer's report for the fiscal year.

Objected to on the ground that no action of the board of managers, after receipt of notice from the plaintiff, which was on the 17th of July, 1890, is in *no* way binding upon plaintiff, or in any way affects the issues between the parties in this action.

Received and marked in evidence Respondents' Exhibit G of this date, being pages 23, 24, 25, 26, 45 and 128 of the volume known as Proceedings for 1890.

31 Q. Are the payments by check as to which evidence has been given all included in this statement or report which is spread on the minutes of that meeting?

A. All the checks for the year are included in that report. By that I refer to the four exhibits.

Adjourned to Thursday, March 21st, at 2 p. m.

WILLIAM B. ANDERSON,
Special Examiner.

207 Hearing continued March 21st, 1895.
Same appearances.

Rev. JOSHUA KIMBER, recalled, testified as follows:

Direct examination by Mr. BARRY:

32 Q. Doctor, you will recollect that at the last hearing evidence was given of the resolutions adopted at various times by the board of managers, and the list of checks and payments which has been prepared by Mr. Roberts and introduced into evidence, was also referred to; can you state whether all of those payments were necessarily made for the purposes designated?

A. Yes, they were necessarily made for those purposes.

Exhibits heretofore marked for identification A, B, C, D and E received in evidence and marked with the corresponding letters.

Counsel for complainant reserves the right to state any objections he may have after he has had an opportunity to examine the schedules.

Respondents' counsel offers in evidence the resolutions in full, which were read and referred to by Dr. Kimber in his testimony at the last hearing, together with schedules therein contained, the copy being supplied to the referee to be attached to the evidence taken, and no objection being made by the complainant's counsel to the original not being attached.

Copy received and marked in evidence Respondents' Exhibit H of this date.

Complainant's counsel reserves the right to interpose at the next hearing such objections as he may deem necessary to the resolutions and schedules, after he has had an opportunity to go over them.

Cross-examination by Mr. BRAINERD:

208 33 X Q. Did you ever see Mr. Thompson of Philadelphia, Doctor—Mr. Henry C. Thompson?

A. Yes, sir; I saw him on one occasion. I could not identify the time. He came into the office on one occasion.

34 X Q. About when was that?

A. I could not answer much closer than to say it was in the summer time.

35 X Q. Do you remember the year?

A. No, I could not say.

36 X Q. Was it when your society received this check?

Counsel for respondents objects to this on the ground that it is not cross-examination upon any subject which was entered upon by the defendants, or either of them.

A. That is my impression.

37 X Q. The check of fifteen odd thousand dollars, I mean?

A. I should say that it was on that occasion that I saw him.

38 X Q. Did your society give Mr. Thompson a release at that time?

Respondents' counsel objects to this on the ground that the time for the complainant to examine has expired. Objected to on the further ground that the question calls for incompetent testimony; it is not a matter for parole testimony, and calls for the opinion of the witness in regard to an alleged written instrument.

A. I can only answer to the best of my knowledge and belief that I do not believe any release was given.

39 X Q. Did you receive the check?

A. No, sir.

40 X Q. Who did receive it?

A. The assistant treasurer, I believe; but I do not know positively.

41 X Q. That is Mr. Roberts?

A. Yes.

42 X Q. Did Mr. Thompson at that time offer any bonds to the society in discharge of the legacy of Dr. Saul?

A. I am very certain he did not; I would have known if
209 any such bonds had been offered. I am the custodian of the seal, and would have known it.

43 X Q. I mean bonds like railroad bonds.

A. He did not offer any to my knowledge.

44 X Q. The meeting of the board of managers, June 11th, 1889, was held after the meeting of the authoritative body of the corporation, was it not?

A. The meeting of the board of missions, which is a general convention for missionary purposes, met in October, 1889.

45 X Q. Had there been a meeting previous to that time?

A. Not for two and a half years or more.

46 X Q. And this resolution passed at the June meeting was passed under the general authority which the board of managers possessed, was it not?

A. Yes, sir.

47 X Q. The board of managers possesses the general authority?

A. Yes, sir.

48 X Q. And, as I understand it from the resolution, those appropriations are made for the year to come, are they not?

A. The year beginning September 1st, afterwards.

49 X Q. The year begins September 1st?

A. Yes, sir.

50 X Q. So that the resolution passed June 11, 1889, related to the year beginning the September following?

A. Exactly; yes, sir.

51 X Q. And is that the case in regard to the several resolutions which have been introduced in evidence?

A. It is, sir.

52 X Q. I am asking only about the meeting of June 11, 1889, and as I understand it there were then three resolutions passed, were there not?

A. Yes, sir; domestic, including Indians; colored and foreign; I think foreign was last in the order.

53 X Q. And also a resolution in regard to general expenses?

A. Yes, sir; two resolutions, dividing it half and half.

210 54 X Q. Those all relate to the year 1889–'90, beginning with September 1st?

A. 1889–'90; yes, sir.

55 X Q. Was there any other resolution passed during that year in regard to those appropriations?

A. Not that I remember—I have to change that answer. At the meeting of November 12th, 1889, you will find a resolution modifying the matter of the colored appropriations.

56 X Q. And when was that passed?

A. November 12th, 1889.

57 X Q. And that is the only further action then taken by the board of managers, is it, modifying the appropriations?

A. So far as my memory serves me, yes.

58 X Q. I would like you to state with as much positiveness as you can whether that is so or not.

A. I can state it with positiveness.

59 X Q. That resolution was an increase of the colored appropriation, was it not?

A. Yes, sir.

60 X Q. Those resolutions having been passed, then, as I understand it, the practice of the executive officers of the board of missions is to go on with the prosecution of the work outlined by these appropriations?

A. Yes, sir; certainly.

61 X Q. And as I understand it, as a part of each resolution there is a specification of amounts, is there not, appropriated?

A. Yes, sir.

62 X Q. Is that so in all cases?

A. In the case of domestic and foreign it is so in regard to all dioceses and jurisdictions. In the case of the colored work the disbursements are made upon a schedule furnished by a commission which sits in Washington.

63 X Q. And how often do they furnish that schedule?

A. They furnish it annually, but of course they make changes from time to time.

64 X Q. Are you able to state what changes, if any, were made in that schedule after the resolution of November, 1889, to which you referred?

A. Well, their first schedule in that year naturally referred
211 to the appropriation for the first quarter, and then when this forty-thousand-dollar appropriation was made they must have furnished another schedule. I can only answer so far as that.

65 X Q. There was a meeting of the board of managers June 10, 1890, was there not?

A. Yes, sir.

66 X Q. At which this resolution was adopted: "Resolved, that the treasurer be instructed to apply so much of the gross amount received from domestic, foreign and colored legacies to September first, 1890, as may be required toward the appropriation for corresponding work to the same date"?

A. Yes, sir.

67 X Q. When was the next meeting of the board of managers after June 10th?

A. September would be the next one.

68 X Q. What time in September?

A. The second Tuesday.

69 X Q. So that between those two periods the work of the society was carried on under the resolutions to which you have already referred?

A. Yes, sir.

70 X Q. Are you able to state, Doctor, what sums, if any, were carried to these appropriations under the resolution of June 10th?

A. No, sir; I could not answer that. That would not come under my department.

71 X Q. Who could tell?

A. Mr. Roberts, as assistant treasurer, could tell. That would not come under my immediate observation.

72 X Q. By what authority under your form of organization are new missions established; by the board of managers?

A. New missions may be established by the board of managers, and are sometimes. The house of bishops has the supreme power of making the missionary jurisdiction under the canons of the church.

73 X Q. And new missions are only established at a regular session of one body or the other.

A. Yes, sir.

212 74 X Q. Are you able to state whether any new mission was established between the 1st of June, 1890, and the 1st of September, 1890?

A. I am not able to state with absolute certainty, but I am very sure there was not.

75 X Q. Do I understand you to say, Doctor, that the house of bishops has authority to create a mission, and impose the care and responsibility of that mission upon this corporation by its own independent action, without conference with the authorities of the mission society?

A. That is so, sir; the board would have to pay the salary of the bishop.

76 X Q. Might not the house of bishops have held a special meeting during the period I have specified?

A. No, sir; because the general convention met in October of that year, and the house of bishops cannot meet within six months of the general convention for any purpose; I am sure they can't. They can't to elect a bishop anyhow.

Redirect examination by Mr. BARRY:

77 R. D. Q. You were asked on the cross-examination whether the time you saw Mr. Thompson was the time you received this check. The question is a little indefinite in my mind, and I want to ask whether you mean that it was to the best of your recollection somewhere in the neighborhood of the time that the society received a certain check for some fifteen odd thousand dollars in part payment of a legacy from Dr. Saul, to which reference has been made.

A. My impression is that that was the time I saw Mr. Thompson, and the only time that I have ever seen him; when he made a payment to the society.

78 R. D. Q. He was the executor of Dr. Saul's estate?

A. Yes, sir.

79 R. D. Q. Do you remember whether he brought the check with him?

A. I do not; I do not think I had anything to do with the check at all. I think I saw the gentleman making payment; that
213 is all. I do not remember having had anything to do with the transaction.

80 R. D. Q. Do you remember any conversation had with him?

A. The only thing in my mind at all is that I heard Mr. Thompson say to Mr. Roberts "All I care for is an informal receipt for this money." That is the impression left in my mind. He said "Just give me an informal receipt now."

81 R. D. Q. There was some conversation between this Mr. Thompson and some one else in the office which you were near enough to hear?

A. I may have been standing by; I do not remember exactly about that; do not even remember what the man looked like.

By Mr. BRAINERD:

82 R. X Q. The transaction was with Mr. Roberts?

A. Yes, sir.

By Mr. BARRY:

83 R. D. Q. What was the check for?

Objected to by complainant's counsel unless the doctor states the conversation which transpired when the check was presented.

84 R. D. Q. You speak of having recollection of the circumstance and strong impression of what took place at that time?

A. Yes, sir.

By Mr. BRAINERD:

85 R. X Q. And is it your impression that this check was received in part payment of a legacy from Dr. Saul?

Counsel for respondent- objects on the ground that that is a legal question, and calls for a statement of the witness as to the result of the transaction, whereas if he is to state anything about it he must state what occurred, what was said and what was done.

A. Yes, sir.

214 By Mr. BARRY:

86 R. D. Q. Will you kindly state what was said and done?

A. My impression is that I was standing by, having been introduced to Mr. Thompson, and that when the check was handed over he intimated that he only wanted a usual receipt, as there was a balance to be paid in a short time.

87 R. D. Q. A balance upon what?

A. The Saul legacy.

By Mr. BRAINERD:

88 R. X Q. Did Mr. Thompson mention the Saul matter at all in that conversation?

A. It was distinctly understood that I knew that was the business, but I cannot say that he mentioned it.

89 R. X Q. What time of day was it that he came in?

A. I do not know; one or two o'clock; I really don't know.

90 R. X Q. Was it in the afternoon?

A. Yes, I think it was.

91 R. X Q. Was the check filled out at the office or did he produce it?

A. I could not give an answer to that on oath. My impression is that he produced an executed check.

92 R. X Q. Did Mr. Thompson say anything about the amount of the check?

A. Nothing further than what I have already said, that there was a little more to come.

93 R. X Q. I mean the specific amount for which the check was drawn?

A. I do not remember.

94 R. X Q. Did he make any reference to the inventory of the estate, or anything of that kind?

A. No; there was no talk about it at that time; it was all over in a very few minutes.

95 R. X Q. You give only what you recollect; you do not pretend to give anything else?

A. That is all; there may have been a great deal more before I saw the gentleman.

Adjourned to Thursday, March 28th, 1895.

WILLIAM B. ANDERSON,
Special Examiner.

215 APRIL 11, 1895.

The parties appear, but the witness does not, and the hearing is adjourned to Thursday, April 25th. It is agreed between the parties that their objections which have been reserved may be interposed at the hearing of April 25th.

Counsel for the complainant takes his Exhibits Nos. 1 and 2, December 18, 1894, and Respondents' Exhibit A, February 26, 1895, and Exhibit H, March 21, 1895; also Respondents' Exhibits B, C, D and E of February 26, 1895.

WILLIAM B. ANDERSON.

Hearing continued April 25, 1895.

Counsel for the complainant objects to the whole of the three sheets forming part of Respondents' Exhibit H of March 20, 1895, being sheets 3, 4 and 5 of that exhibit as marked by the stenographer, on the ground that there is no evidence in the case tending to establish the connection of the statements contained in those sheets with any action of the defendant subsequent to the receipt of the money from Mr. Thompson on the 19th of June, 1890, nor any evidence tending to show that these statements have any relation to any action of the defendant prior to the date of the receipt of the notice from the plaintiff already proved in this action.

Counsel for the complainant also objects specifically on the same

grounds to the statement on the back of sheet No. 3, headed "Legacies received from Sept 1, 1889, to Sept. 1, 1890," and to each and every part of the said statement.

Counsel for the complainant objects specifically to the following, contained in the last statement above referred to, namely, Pa., Phila., estate of Rev. James Saul, D. D.:

216

Domestic	$5,192.52	
Colored	5,192.51	
		$10,385.03
Foreign		5,192.51

He objects severally to the entire statement above specified, on the ground that the same does not contain any evidence tending to establish any defense interposed by the defendants in this action, and he makes the same objection as to the particular portion of the exhibit headed "Legacies received from September 1, 1889, to September 1, 1890," and he makes the same objection to the specific entry quoted in full from said statement.

Subject to the objections heretofore taken and to the ruling of the court thereon, counsel for the complainant proposes the following questions:

Mr. ROBERTS, recalled, testified as follows:

Cross-examination by Mr. BRAINERD:

49 X Q. Mr. Roberts, you made up, I assume, the four statements marked Respondents' Exhibits B, C, D and E, did you not?

A. They were made up under my direction and under my guidance.

50 X Q. You know, then, I assume, that they embrace all the checks that were drawn during the periods specified in the statements?

A. For the purposes stated, yes.

51 X Q. Who wrote those checks—you?

A. They were signed by me and written under my direction.

52 X Q. And these checks were drawn in the regular course of the business of the society, were they not?

A. Yes.

53 X Q. And these exhibits which I have specified represent the current business of the society in respect of the objects which are specified in them?

217

A. They do.

54 X Q. And you draw these checks in the regular course of business?

A. Yes, sir.

55 X Q. Without reference, I assume, to any present action of the board of managers, that is, any action of the board of managers taken at the time the check is drawn?

A. Not at the moment.

56 X Q. But they are drawn with reference to the action of the

board of managers as exhibited in the resolutions which you introduced in evidence, are they not?

A. Yes.

57 X Q. So that the resolutions which have already been put in evidence here represent the action of the board of managers in regard to these several enterprises or missions?

A. Yes, sir.

58 X Q. These checks, then, I understand, Mr. Roberts, are drawn by you under the action of the board of managers as it has been exhibited here in the resolutions which have been presented?

A. They are.

59 X Q. Although I understand you to say that there may have been action previous to these resolutions which you have put in evidence under which some of them may have been drawn?

A. Yes, sir.

60 X Q. Is there any action of the board of managers upon your minutes in respect to these payments subsequent to the date of the several resolutions which you have introduced?

A. No, sir.

61 X Q. Mr. Roberts, I now call your attention to the three sheets constituting a part of Exhibit H, marked pages 1–2, 3–4, 5–6; at what time was the meeting of the board of managers in 1889, September 23d, was it not?

A. Yes.

62 X Q. The date at the top, New York, March 12, 1895, refers simply, does it not, to the date when this paper was prepared by the court?

A. Yes.

218 63 X Q. But that has nothing to do with the paper as it went before the board?

A. No, sir.

64 X Q. And the statements upon those three sheets I take it were prepared for that meeting of the board of managers, were they not?

A. Yes.

65 X Q. And were they prepared by you?

A. They were.

66 X Q. I take it from the date, which seems to be Sept. 1, 1890, that the statement was prepared subsequent to the first day of September, 1890?

A. Yes, sir.

67 X Q. And you prepared it?

A. I did.

68 X Q. Subject to the revision of Mr. Langford or some other person?

A. No, sir.

69 X Q. You prepared it?

A. Yes, sir.

70 X Q. And after its preparation it was exhibited by you, as financial officer, to the meeting on the 23d day of September?

A. Yes, sir.

71 X Q. And that statement is correct, I suppose, as to the whole of the contents of those papers so far as they constitute a report?

A. Of the financial condition, yes, sir.

72 X Q. The typewritten matter, I take it, at the top of the fifth page, is a statement of what occurred at the meeting?

A. Yes, sir.

73 X Q. So that those three sheets contain the full treasurer's statement up to that date, the first of September, 1890, as submitted to the board for its action at that time?

A. Yes, sir.

74 X Q. And that statement is the result of your own investigation of the books and papers of the society?

A. Yes, sir.

75 X Q. And is really your own account as a financial officer of the society for the period which it embraces, made by you to the board?

A. It is.

76 X Q. This statement is submitted by you to the board, and read, and then acted upon by the board?

A. Yes, sir.

77 X Q. And its approval constitutes a ratification of your action for the period which it embodies?

A. Yes.

219 78 X Q. That is, the official ratification of your method of transacting the business during the period which the report covers?

A. Yes, called for by the by-laws.

79 X Q. How long have you been assistant treasurer?

A. I have been assistant treasurer for about the last fourteen years.

80 X Q. And you draw these checks which are specified in these Exhibits B, C, D, and E?

A. Yes.

81 X Q. You draw them of your own motion as the bills come in, knowing, of course, what the obligations are and would be?

A. I draw them in conjunction with the action of one or the other of the secretaries signing a warrant at the same time; it is a concurrent action.

82 X Q. That is, one officer draws a warrant for the bill and the other officer draws the check?

A. Simultaneous action; yes.

83 X Q. That is to say, you have a warrant corresponding with the amount of the bill and corresponding with the amount of the check?

A. Yes.

84 X Q. Which constitutes a part of the voucher?

A. Yes.

85 X Q. I understand you that a warrant is drawn by whom?

A. It is signed by one or the other of the secretaries.

86 X Q. By one or the other of the secretaries?

A. Yes; the general secretary or the associate secretary.

87 X Q. At the meeting of June 10, 1890, the following resolution was adopted: "Resolved that the treasurer be instructed to apply so much of the gross amount received from domestic, foreign and general legacies to September 1, 1890, as may be required towards the appropriations for the corresponding work on the same date." Do you remember that resolution?

A. Yes, sir.

88 X Q. That, I suppose, is the resolution which the board
220 is in the habit of passing every year?

A. Yes, sir.

89 X Q. It had been previously adopted and has been subsequently adopted?

A. It has been subsequently adopted.

90 X Q. These Exhibits B, C, D, and E have upon the left-hand margin dates beginning with June 2d. Those represent the days on which the checks were drawn, do they not?

A. Yes, sir.

91 X Q. I find certain discrepancies in dates between the drawing date of the check and checks of corresponding amounts in the accounts furnished us by the Bank of New York. Do you or not understand that such a discrepancy of dates might arise from this fact, that the check might not reach the bank until some days after its receipt?

A. Yes, that is perfectly clear, because our checks are all over the United States.

92 X Q. So that if, in the bank account, as I think is true, there appear amounts which are in neither of the statements in the four exhibits I have specified, that discrepancy would arise from the fact that you have taken from your check book the checks drawn from June 2d onward, while there might have been checks out which had not come in until after June 2d to the bank?

A. That would account for it.

By Mr. BARRY:

93 R. D. Q. Do these four accounts made up by you show the dates on which the checks were actually signed and delivered to the parties or sent by mail?

A. Yes.

By Mr. BRAINERD:

94 X Q. Your checks go all over the United States, do they not?

A. They do.

95 X Q. They are transmitted by your office to the employees of the society in every place in the country that they happen to be stationed?

A. Yes.

96 X Q. Exhibit D: On June 21st it appears Hong Kong
221 & Shanghai Banking Company, China mission, $11,972.50. Now, that, I suppose, was a check drawn on that day to meet a draft forwarded from the Hong Kong & Shanghai Banking Company, was it not?

A. Yes, sir.

97 X Q. And necessarily drawn long before?

A. Yes, sir.

98 X Q. Here on the same day is, I think, Yokohama Specie bank, $2,494.27. That was a check drawn to meet a draft in the same way, was it not?

A. Yes, sir.

99 X Q. There is one, July 3d, Yokohama Specie bank, $2,494.27?

A. That is a similar case.

100 X Q. What is the time between two places for banking purposes?

A. Between China, Japan and United States from twenty to thirty days.

101 X Q. There is another, July 25th, Hong Kong & Shanghai, $2,993.12. Is the same true of that?

A. Yes, sir.

102 X Q. There is another, Yokohama Specie bank, $1,995.42?

A. Yes, sir.

103 X Q. Those drafts were drawn in the regular course of business to meet the expenses of those missions?

A. To meet payments under appropriations under the action of the board.

104 X Q. You were present when Mr. Thompson came with this check?

A. I was.

105 X Q. Did you give him a release?

A. No, sir.

106 X Q. What did you give him?

A. Simply a business receipt.

107 X Q. Would you take the responsibility of stating it on the record?

A. Not remembering the exact words of the receipt and all the surrounding circumstances, I could not.

108 X Q. Your recollection is that you gave him a receipt for so much money?

A. Simply that and nothing more.

109 X Q. Running in about what terms?

A. Received from so-and-so so much money on account?

222 110 X Q. Did he ask you for a release?

A. No.

111 X Q. Did he not present a release to you?

A. He did not.

112 X Q. How long was he with you?

A. Possibly five minutes; long enough to have the receipt made out.

113 X Q. He did not present any bonds?

A. Nothing whatever.

114 X Q. Did you ask him about any bonds?

A. No.

115 X Q. Or securities of any sort?

A. No.

116 X Q. So that practically all that passed between you was that he came in, announcing that he was Mr. Thompson, and presented this check, and you gave him a plain receipt for it, and he left?

A. Exactly.

117 X Q. That is all there was to it?

A. That is all; yes.

118 X Q. Suppose you state as nearly as you can what conversation took place between you?

A. I have the original memorandum handed to me with the check. Mr. Thompson simply said, "I am Mr. Thompson (mentioning his initials). Here is so much on account of the Saul legacy," and he made a check, with this memorandum, and asked me for a receipt on account. I left Mr. Thompson and went into the secretary's room, and we spoke together. I made out a receipt and handed it to Mr. Thompson, and he went out.

Memorandum offered in evidence, and marked Respondents' Exhibit I, of this date.

Counsel for complainant takes exception to the paper in evidence on the ground that it is a paper prepared by a person not a party litigant to this action and without the knowledge of the complainant, and is not evidence against him.

By Mr. BARRY:

223 119 R. D. Q. Mr. Roberts, there is some memoranda of your own on that paper, is there not?

A. There is.

120 R. D. Q. Will you read the portion which is in Mr. Thompson's handwriting, and which constituted the entire memoranda at the time it was received with the check.

A. I do not know Mr. Thompson's handwriting, but the paper was as follows when handed to me by him:

"Estate of JAMES SAUL.

Balance as per accounts filed	$14,927.54
Dividends received since, not included in account...	650.00
	$15,577.54"

By Mr. BRAINERD:

121 R. X Q. That is all the memoranda?

A. That is all; yes.

By Mr. BARRY:

122 R. D. Q. When were those memoranda of yours put on?

Counsel for the complainant objects to this question, on the ground that nothing that was done by Mr. Roberts after he received that memoranda has any probative force or is in any way binding upon the complainant.

A. Some of them at once.

123 R. D. Q. Which at once?

A. The figures in the blue-pencil mark, $15,577.54, followed by the stamp, "Received June 19, 1890, Domestic & Foreign Missionary Society;" the lead-pencil words, "Legacies, Pa., Philadelphia, estate of Rev. James Saul, D. D.;" the words, "One-third domestic equals $5,192.52; one-third foreign equals $5,192.51; one-third colored equals $5,192.51."

By Mr. BRAINERD:

124 X Q. Were those put on at the same time?

A. All at the same time.

224 125 X Q. What became of the paper after that? It was put with your vouchers, I suppose?

A. Filed with our vouchers as showing receipts of money.

126 X Q. And was it produced when your account was prepared and submitted to the board of managers in September?

A. Not this paper.

127 X Q. The reference to that paper in your report to the board of managers is in that statement of legacies, is it not?

A. Made from the books on receiving it.

128 X Q. That entry was made by your direction?

A. Made by my direction; yes.

129 X Q. In whose handwriting are they (showing witness a paper)?

A. I should think the entry clerk's. They are all mine except the ink figures.

130 X Q. And whose are those (showing witness a paper)?

A. The entry clerk's.

131 X Q. Of course Thompson was not there when those were made?

A. He probably left two or three minutes before.

132 X Q. He had no knowledge of those, I suppose?

A. No.

133 X Q. Did you have the will before you at that time?

A. Yes.

134 X Q. Did Thompson produce it?

A. No.

135 X Q. When he came in you went and got it?

A. After he left.

136 X Q. And then made your memoranda?

A. Yes.

137 X Q. Have you given all the conversation that passed between you and Thompson?

A. His words were that he was simply making a payment on account. That is the impression I got. I would not like to use just his language.

138 X Q. Who was present when Thompson was there?

A. During the time Mr. Thompson was there Dr. Langford, Rev. Mr. Kimber and the associate secretary were passing in and out. I do not know whether or not they were present just at the moment he came in. I went to the secretary after receiving this memoranda and check.

225 139 X Q. Thompson was not there?

A. No, he did not go into the secretary's room at all. I think the secretaries passed in and out during the time.

140 X Q. Be good enough to look at the minute book of the society, and inform us on how many occasions prior to June, 1896, the board passed a resolution similar in character to that passed on that day, with reference to the temporary use of legacies.

Adjourned to Thursday, May 16th, at 2 p. m.

WILLIAM B. ANDERSON,
Special Examiner.

Hearing continued July 11, 1895.

Cross examination of Mr. ROBERTS.

By Mr. BRAINERD:

141 X Q. I now repeat the question which was put to you at our last appearance before the special examiner; what is your answer?

A. That was the first occasion on which such a resolution was passed.

142 X Q. That was the first occasion?

A. Yes.

143 X Q. Subsequent to that time has it been passed?

A. Every year.

Respondents' counsel offers in evidence the exemplified copy of the proceedings upon the accounting of Benjamin Watson, D. D., and Henry C. Thompson, executors of the last will and testament of James Saul, deceased.

Received and marked Respondents' Exhibit J.

Respondents' counsel offers in evidence two bank books, being the originals of those on record.

Received and marked Respondents' Exhibits K and L.

Before the special examiner marked the books as exhibits
226 counsel for the plaintiff objected, on the ground that the same, and each of them, were incompetent and immaterial, and irrelevant to the issues in this case. It is stipulated between counsel that these books need not be filed with the evidence or printed in the record, but respondents' counsel is to produce the originals upon the hearing if the same are deemed necessary. It is submitted that these are the genuine and original bank books of Mr. Thompson.

Hearing adjourned to Thursday, July 25, at 2 p. m.

WILLIAM B. ANDERSON,
Special Examiner.

Hearing continued before William B. Anderson, Esq., special examiner, on Tuesday, January 14, 1896, at 11 a. m.

Same appearances.

It is stipulated between counsel that the original checks referred to in the statements introduced in evidence on March 21, 1895, need not be produced or offered in evidence, and that no objection

will be made to the evidence as secondary, it being agreed that the checks were all drawn in the usual form of bank checks, and that but one form was used by the society. It is further agreed that if complainant's counsel desires at any time to refer to these checks they will be referred to him at such time as is deemed proper, and such as he desires will be produced upon the hearing and received as evidence.

It is further stipulated that the exhibits annexed to the answer and the supplemental answer of the respondents are to be taken and treated as put in evidence by them with the same force and effect as if the originals were produced.

227 Mr. ROBERTS, recalled, testified as follows:

By Mr. BARRY:

144 R. D. Q. Mr. Roberts, I call your attention to the further answer filed by the defendants in paragraph 3d, in which occur the following statements: "These defendants further answering allege that on or about the 17th day of November, 1887, these defendants saw in the public newspapers a notice of the death of the said Rev. Dr. Saul on the 16th day of November, 1887. On or about the 28th day of December, 1887, these defendants received from Henry C. Thompson a letter, a copy of which is annexed hereto and marked Exhibit A. On or about the 29th day of December, 1887, these defendants mailed said Thompson a letter, a copy of which is annexed hereto and marked Exhibit B. On or about the 26th day of July, 1888, these defendants mailed the said Thompson a letter, a copy of which is annexed hereto and marked Exhibit C. These defendants further allege that on or about the 17th day of September, 1888, these defendants mailed to the Philadelphia Safe Deposit and Insurance Company, and to said Henry C. Thompson and the Rev. Benjamin Watson, a letter, a copy of which is annexed hereto and marked Exhibit D. And these defendants further allege that they were, on or about said date, informed and believed that the conveyance requested in said Exhibit B was promptly made by said Thompson. These defendants further allege that subsequent to the 26th day of July, 1888, and prior to the 20th day of February, 1890, no communication was made by these defendants to the said executors in reference to said estate. That on or about the said 20th day of February, these defendants mailed to the said Henry C. Thompson a letter, a copy of which is annexed hereto and marked Exhibit E. These defendants further allege that on or about the 15th

228 day of April, 1890, these defendants received from the said Benjamin Watson a letter, a copy of which is annexed hereto and marked Exhibit F. These defendants further allege that on or about the 17th day of April, 1890, they mailed to the said Henry C. Thompson a letter, a copy of which is annexed hereto and marked Exhibit G." Are the statements which are there set forth in all respects true to your knowledge?

A. They are.

145 R. D. Q. Now, Mr. Roberts, does the society receive many legacies for the purposes of its operations?

A. Quite a number.

146 R. D. Q. Each year?

A. Each year.

147 R. D. Q. And are those legacies always paid promptly?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. By no means.

148 R. D. Q. Do you have occasion to request the payment of legacies from executors before you receive them?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. Frequently.

149 R. D. Q. Were the requests which you made of Thompson unusual in number?

Counsel for complainant objects to the question as incompetent, as having no relations whatever with the controversy in this case.

A. No.

150 R. D. Q. Your experience generally is that they are paid after a delay which is habitually serious?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

229 A. Not habitually; some legacies are paid very promptly.

151 R. D. Q. In the cases where you have delay you receive them ultimately in almost every case, do you not?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. Yes.

152 R. D. Q. And the greater number are paid after delay?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. Yes.

153 R. D. Q. Were you informed as to what the laws of Pennsylvania were regulating the payment of legacies?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. No.

154 R. D. Q. Did you consult counsel in reference to the payment of this legacy before the notice was received from Mr. Holly?

Counsel for complainant objects to the question as incompetent, and as having no relations whatever with the controversy in this case.

A. No; I did not consider it necessary to consult counsel.

155 R. D. Q. Mr. Roberts, in paragraph 3d of the further answer occurs the following statements: "These defendants further allege that on or about said 17th day of April, 1890, they mailed to
230 the Rev. Benjamin Watson a letter, a copy of which is annexed hereto and marked Exhibit H; and that on or about the 25th day of April, 1890, these defendants received a postal card from the said Rev. Benjamin Watson, a copy of which is annexed hereto and marked Exhibit I. These defendants further allege that on or about the 29th day of April, 1890, these defendants received a letter from the said Rev. Benjamin Watson, a copy of which is annexed hereto and marked Exhibit J. That on or about the 1st day of May, 1890, these defendants wrote said Dr. Watson that no word had been received from said Thompson. Of this letter defendants have no copy. On or about the 24th day of May, 1890, these defendants wrote the said Dr. Watson a letter, a copy of which is annexed hereto and marked Exhibit K. These defendants further allege that on or about the 28th day of May, 1890, these defendants wrote the Rev. Dr. Watson a letter, a copy of which is annexed hereto and marked Exhibit L. These defendants further allege that on or about the 30th day of May, 1890, these defendants received from the said Benjamin Watson two letters, copies of which are annexed hereto and marked Exhibits M and N." Are those statements correct?

A. Yes.

156 R. D. Q. These requests for payment of legacy which are set forth in these letters are the only ones that were made, are they not?

A. The only ones.

157 R. D. Q. And they were not made upon any other information than that set forth in that correspondence?

A. That is all.

158 R. D. Q. You were not led to make these requests except under the circumstances set forth in those letters?

A. Only in that way.

159 R. D. Q. Your knowledge of the death of Dr. Saul was derived from the newspapers, was it not?

A. Yes.

160 R. D. Q. Dr. Saul was for a number of years prior to his death a member of the board of managers of this society, was he not?

A. Yes.

231 161 R. D. Q. In the habit of giving money to the society in his lifetime?

A. Yes.

162 R. D. Q. Did Dr. Saul always exhibit great care in the management of the affairs of the society so far as he took part therein?

A. Yes, sir.

163 R. D. Q. And great care in the method of giving to the society in his lifetime?

A. Yes.

164 R. D. Q. Did he place a copy of this will in the hands of the society before his death?

A. Yes. So far as I remember, it was exactly the same will which was afterwards proved as his.

165 R. D. Q. The society is purely a religious, charitable and benevolent one, is it not?

A. Entirely.

166 R. D. Q. Engaged in missionary operations throughout the world?

A. Yes.

167 R. D. Q. Prior to the time that you received this notice from the plaintiff, Mr. Holly, did you have any knowledge that Thompson had disposed of the property of Dr. Saul's estate improperly?

A. No.

168 R. D. Q. And did you know before that time that Thompson was insolvent?

A. No.

169 R. D. Q. When you received that money from Thompson in June, 1890, did you believe that he was an honest and solvent man?

Counsel for the complainant objects to the question as immaterial and incompetent, and as having no relation to the issues in this action.

A. Yes.

By Mr. BRAINERD:

170 R. X Q. Mr. Roberts, you have charge of the business of looking after the funds of the society, have you not?

A. Yes; as assistant treasurer.

171 R. X Q. And it is part of your duties, I presume, to make collections as rapidly as you can?

A. Yes.

232 172 R. X Q. Your society receives numerous legacies, does it not, from persons dying in the city and State of New York?

A. Yes.

173 R. X Q. And you are familiar with the rules in regard to the payment of legacies which prevail in the State of New York, are you not?

A. Yes.

174 R. X Q. You know that in this State legacies, as a rule, are payable at the end of a year?

A. Yes.

175 R. X Q. And as I understand you, Mr. Roberts, you made no

inquiries as to the particular condition of the law in the State of Pennsylvania?

A. No.

176 R. X Q. And you were not advised as to what the rule in that regard was in the State of Pennsylvania at that time?

A. No.

177 R. X Q. You had, then, no reason to suppose that it was different from the rule which prevails in the State of New York, did you?

Respondents' counsel objects to the question as a conclusion, and as immaterial and irrelevant.

A. No.

178 R. X Q. The naration of facts which has been put in evidence from the answer I understood you to say was correct; I refer now to the portion of the answer numbered section 3?

A. Yes.

179 R. X Q. You have verified that, have you not?

A. Yes.

180 R. X Q. And that narration of facts is a complete statement of all that occurred, is it not?

A. Yes.

181 R. X Q. That embraces everything, does it not?

A. Yes.

182 R. X Q. Was there any oral communication with anybody outside or beyond what is specified in that paragraph which was read to you and which forms a part of the testimony?

A. Not so far as I know.

233 183 R. X Q. When Dr. Saul brought this will to you did he tell you the amount of his property?

A. No.

184 R. X Q. Did he tell you how it was invested?

A. No.

185 R. X Q. He simply delivered the will to you and left it there?

A. Yes, in a sealed envelope.

186 R. X Q. So that you did not even at that time know its contents?

A. No.

187 R. X Q. And it was not until the decease of Dr. Saul that you opened the envelope and saw it?

A. Yes.

188 R. X Q. And you were advised immediately of the death of Dr. Saul by the papers?

A. Yes.

189 R. X Q. I notice one of the letters which you have put in here dated Philadelphia, December 28, 1887, and signed by Mr. Thompson. Do you remember the receipt of that letter? (Witness handed paper.)

A. I have no distinct present recollection of seeing that letter on that day.

190 R. X Q. The complainant's counsel places in the hand the counsel for the respondents the original letter. He exhibi to the witness, and asks him if the stamp mark in the corner, " mestic & Foreign Missionary Society, Protestant Episcopal Chu December 29, 1887," &c., does not indicate that the letter wa ceived at the office of the society on that day?

A. It does.

191 R. X Q. And have you any doubt about its having b received on that day?

A. None whatever.

192 R. X Q. And who would be authorized to impress that st on the letter?

A. The person to whom it is addressed, the Rev. Dr. Kimber

193 R. X Q. And have you any doubt, Mr. Roberts, that you that letter on that day or about that time?

A. About that time.

194 R. X Q. And you are familiar with its contents?

A. Yes.

195 R. X Q. What inquiries, if any, did you make in regar Mr. Thompson's solvency and liability, or did you make any?

A. None.

234 196 R. X Q. Did you have any direct information f Mr. Thompson as to the proof of the will and his quali tion as executor?

A. I do not think I did.

197 R. X Q. Or the qualification of his associate, Dr. Watso

A. None.

198 R. X Q. You did not have any direct information on subject?

A. No.

199 R. X Q. I notice that the letter, Exhibit A, annexed to further answer, does not contain any statement that the execu had qualified or the will had been proved, and I now unders you to say that no information came to you by letter in that re from any one?

A. I believe that.

200 R. X Q. That letter of Mr. Thompson's, Exhibit A, ann to the further answer, was acknowledged by the associate secre Mr. Kimber, was it not? (Witness handed paper.)

A. Yes.

201 R. X Q. And that acknowledgment is the letter B, ann to the further answer? (Witness handed paper.)

A. Yes.

202 R. X Q. If I understand your testimony correctly as t succession of events, the next communication to Mr. Thom was dated the 26th of July, 1888, and signed by the general s tary of the society, was it not, and appears to be Exhibit C, ann to the further answer? (Witness handed paper.)

A. Yes.

203 R. X Q. And the next communication, if I understand rectly your statement, addressed by the society to Mr. Thomp was Exhibit D, annexed to the further answer and signed by

Kimber, the associate secretary, was it not? (Witness handed paper.)

A. Yes.

204 R. X Q. I call your attention, Mr. Roberts, to Exhibit C, annexed to the further answer of the respondents, being dated July 26, 1888, and ask you if there was any reply received from

235 Mr. Thompson to that letter? (Witness handed paper.)

A. I believe not.

205 R. X Q. You have searched, have you not, with care for the correspondence and have produced all you have been able to find?

A. Yes, sir.

206 R. X Q. And you have discovered no reply to that letter, as I understand it?

A. Have discovered none.

207 R. X Q. And, as I understand you, there are produced and annexed to the pleadings, and now put in evidence, all the letters that were exchanged between the society through any of its officers and Mr. Thompson or Dr. Watson—is that so?

A. Yes, sir.

208 R. X Q. Every one?

A. Every one.

209 R. X Q. Do you remember seeing a letter the original of that copy? (Witness handed Complainant's Exhibit 3.)

A. I can't say that I remember it.

Adjourned to Thursday, Jan. 30th, 1896, at 2.30 p. m.

236 *Stipulation.*

Circuit Court of the United States, Southern District of New York.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, ETC., and E. Walter Roberts.

It is hereby consented that the following-described exhibits offered by the defendant at the several hearings before William B. Anderson, special examiner, need not be printed, but that the originals thereof, marked by the special examiner, may by either party be referred to as an evidence upon any hearing of this cause, viz:

Exhibit A, February 26th, 1895.—Statement showing all checks drawn on the society, from June 1st, 1890, to August 1st, 1890.

Exhibit B, February 26th, 1895.—Statement showing all checks drawn on the Society for Domestic Missions, from June 1st, 1890, to August 1st, 1890.

Exhibit C, February 26th, 1895.—Statement showing all checks drawn by the Society for colored missions, from June 1st, 1890, to August 1st, 1890.

Exhibit D, February 26th, 1895.—Statement showing all checks drawn by the society for foreign missions, from June 1st, 1890, to August 1st, 1890.

237 Exhibit E, February 26th, 1895.—Statement showing all checks drawn by the society for its general expense account, from June 1st, 1890, to August 1st, 1890.

Exhibit F, March 7th, 1890.—Acts of incorporation, constitutio and by-laws.

Exhibit G, March 7th, 1895.—Pages 23, 24, 25, 26, 45 and 128 the proceedings of 1890.

Exhibits K and L.—Bank books.

Dated New York, April 28th, 1897.

CEPHAS BRAINERD,
Complainant's Solicitor.

DAVIES, SHORT & TOWNSEND,
Respondents' Solicitors.

238 RESPONDENTS' EXHIBIT "H."

March 20, 1895.

W. D. Anderson, Sp'c'l Ex'r.

Board of Managers.

Extracts from Minutes of Meeting of June 11, 1889.

"Resolved, That appropriations for domestic missions other tha for work among the colored people for the fiscal year ending Se tember 1st, 1890, be and hereby are made according to the schedu at present in force, viz:

Missionary jurisdictions.	For work among white people. Annual rate.	For work among In dians. Annual rate
Alaska		$2,000
Colorado	$6,000, incl. b'p's sal'y, $3,000.	
Indian Territory	3,000, incl. b'p's sal'y.	1,500
Montana	6,000, incl. b'p's sal'y, $3,000.	
Nevada and Utah	5,500, incl. b'p's sal'y, $3,000.	
New Mexico and Arizona	5,500, incl. b'p's sal'y, $3,000.	
No. California	4,500, incl. b'p's sal'y, $3,000.	
No. Dakota	5,000, incl. b'p's sal'y, $3,000.	
No. Texas	6,000, incl. b'p's sal'y, $3,000.	
Oregon	6,000, incl. b'p's sal'y, $3,000.	
So. Dakota	4,700, incl. half b'p's sal'y, $1,500.	29,800 (incl. one-half of b'p's salary, $1,500.)
Washington Territory	5,500, incl. b'p's sal'y, $3,000.	
West Texas	6,000, incl. b'p's sal'y, $3,000.	
Wyoming and Idaho	5,000, incl. b'p's sal'y, $3,000.	800
Total appropriations for missionary jurisdictions	$68,700	$34,100

239

Dioceses.

	For work among white people. Annual rate.	For work among Indians. Annual rate.
Alabama	$500 00	
Arkansas	1,500 00	
California	1,500 00	
East Carolina	800 00	
Easton	1,000 00	
Florida	1,800 00	
Fond du Lac	1,500 00	$500 00
Georgia	500 00	
Indiana	2,000 00	
Iowa	3,000 00	
Kansas	3,000 00	
Kentucky	1,000 00	
Louisiana	500 00	
Maine	2,400 00	
Milwaukee	1,000 00	
Minnesota	3,000 00	4,355 00
Mississippi	1,600 00	
Missouri	1,000 00	
Nebraska	3,000 00	
New Hampshire	2,000 00	
New York	3,000 00	
North Carolina	1,000 00	
Quincy	1,000 00	
South Carolina	1,000 00	
Springfield	2,000 00	
Ohio	400 00	
Tennessee	1,300 00	
Texas	1,000 00	
Virginia	400 00	300 00
West Virginia	500 00	
West Michigan	1,300 00	
	$114,200 00	$39,255 00

Summary.

For missions to white people	$114,200 00
For missions to Indians	39,255 00
To which add:	
For Chinese missionaries to the Chinese in California	500 00
Official travelling expenses of the missionary bishops, within their respective jurisdictions up to $300 for each	3,900 00
Reserved for central expenses and for the cost of making the work known to the church, say	16,500 00
Total	$174,355 00

240 *Emigrant Chaplaincy for Deaf-mute Missions in the West and South Respectively.*

Meeting of June 11, 1889, continued.

By request the secretary read the summary of the proposed appropriations for foreign missions, showing also the present schedule and the amount asked for from the field as follows:

Proposed to allow for 1889–'90:

Missionary school in Athens	$2,300 00
Mission in Africa	26,096 00
Mission in China, including extra appropriation, items in New York	46,087 00
Missions in Japan, including extra appropriation, items in New York	49,028 25
Missions in Haiti	7,780 00
Disabled missionaries and widows and children, etc.	3,762 00
Reserved for central expenses	16,500 00
	$151,553 25

On motion of Rev. Dr. Eccleston, it was,

Resolved, That the appropriations for foreign missions as proposed in the foregoing schedule be — hereby are made the appropriations of this board for foreign missions for the fiscal year 1889–'90."

"Resolved, That this board does hereby appropriate for the first quarter of the coming fiscal year for the work under the charge of the commission for work among colored people, at the annual rate of $20,000."

Meeting of November 12, 1889.

"Resolved, That the recommendation of the board of missions be complied with and the appropriation be and hereby is made for the work of the commission for work among the colored people at the annual rate of $40,000, exclusive of specials from Dec. 1st, 1889."

241 *Meeting of June 10th*, 1890.

"Resolved, That the treasurer be instructed to apply so much of the gross amount received from domestic, foreign, and general legacies to September 1st, 1890, as may be required toward the appropriations for corresponding work to the same date."

True copies.

Attest: JOSHUA KIMBER,
Associate Secretary.

NEW YORK, *March 12th*, 1895.

Board of managers.

Extract from the Minutes, Sept. 23d, 1890.

The assistant treasurer presented and read the treasurer's report for the last fiscal year as follows:

1889.			1889.		
Sept. 1st. To cash paid out since Sept. 1st, 1889, on account of:			Sept. 1st. By cash on hand		$102,090 07
Domestic missions	$139,067 34		1889.		
Indian missions	45,479 24		Sept. 1st. By cash received since Sept. 1st, 1889, on account of:		
Colored missions	35,794 24		Domestic missions	$105,592 55	
		220,067 84	Indian missions	25,072 04	
Foreign missions		179,344 23	Colored missions	19,072 26	
Cost of administration and collection		25,922 13			149,736 85
Printing reports of the board, Spirit of Missions for the Clergy, pamphlets and leaflets for gratuitous distribution		9,424 09			122,467 44
			Foreign missions		51,879 86
Legacies (of which temporarily deposited with standing committee on trust funds, $50,000)		54,547 45	General missions		54,823 99
		56,084 17	Legacies		63,778 40
Specials			Specials		
Missionary enrolment fund:			Missionary enrolment fund:		
Repayments to contributors and transfers by their request	6,532 53		Contributions	37,008 07	
Deposited with standing committee on trust funds	36,338 73		Withdrawn from standing committee on trust funds	5,527 53	
		42,871 26			42,535 60
		89,702 76			177,176 63
Church missions house		10,940 10	Church missions house		11,359 60
"The Spirit of Missions"		12,844 44	"The Spirit of Missions"		12,788 01
"The Young Christian Soldier"			"The Young Christian Soldier"		
Paid from deposits with standing committee on trust funds for episcopate endowment funds of Colorado and Oregon		22,000 00	Withdrawn from deposits with standing committee on trust funds for episcopate endowment funds of Colorado and Oregon		22,000 00
Collateral inheritance tax on the bequests of Wm. H. Vanderbilt		11,775 00	Received from Messrs. Cornelius and Wm. K. Vanderbilt, for collateral inheritance tax on the bequests of William H. Vanderbilt		11,775 00
Paid out on account of receipts not relating to the current work of the society		13,285 59	Received for purposes not relating to the current work of the society		13,359 17
To cash on hand Sept. 1st, 1890 (of which drawing interest in Union Trust Co., $75,000)		85,372 59			
		$833,751 53			$833,751 53

GEORGE BLISS, *Treasurer.*

NEW YORK, *September* 1st, 1890.

The auditing committee respectfully report that for the proper fulfilment of their duties they have secured the services of a competent and reliable accountant, who reports he has examined the accounts of the treasurer, compared the same with the vouchers, and found them correct.

OCTAVIUS APPLEGATE,
JULIEN T. DAVIES,
BACHE McE. WHITLOCK,
Auditing Committee.

10201

Statement of Receipts and Payments for Domestic Missions from September 1st, 1889, to September 1st, 1890.

1889. Sept. 1st. To cash paid since Sept. 1st, 1889, on account of mission work in—	White.	Indian.	Colored.	Total.
Alaska	.....	$6,477 81	.....	$6,477 81
Indian Territory	$3,415 05	878 29	.....	4,293 34
Montana	6,311 40	.....	.....	6,311 40
Nevada and Utah	5,433 33	.....	.....	5,433 33
New Mexico and Arizona	5,611 98	.....	.....	5,611 98
North Dakota	4,000 00	.....	.....	4,000 00
Northern California	4,739 95	.....	.....	4,739 95
Northern Texas	5,324 99	.....	.....	5,324 99
The Platte	1,903 51	.....	.....	1,903 51
South Dakota	4,391 87	31,368 15	.....	35,760 02
Washington Territory	5,700 00	.....	.....	5,700 00
Western Texas	6,275 55	.....	.....	6,275 55
Wyoming and Idaho	4,890 83	800 00	.....	5,690 83
Alabama	500 00	.....	$1,000 00	1,500 00
Arkansas	1,500 00	.....	200 00	1,700 00
California	1,932 49	.....	.....	1,932 49
Colorado †	14,066 58	.....	.....	14,066 58
East Carolina	1,175 00	.....	2,000 00	3,175 00
Easton	960 96	.....	.....	960 96
Florida	1,800 00	.....	3,050 00	4,850 00
Fond du Lac	1,875 00	500 00	.....	2,375 00
Georgia	187 50	.....	2,800 00	2,987 50
Indiana	1,906 00	.....	.....	1,906 00
Iowa	3,174 98	.....	.....	3,174 98
Kansas	3,750 00	.....	500 00	4,250 00
Kentucky	1,000 00	.....	1,450 00	2,450 00
Louisiana	500 00	.....	1,400 00	1,900 00
Maine	2,399 99	.....	.....	2,399 99
Maryland	.....	.....	2,050 00	2,050 00
Milwaukee	1,000 00	.....	.....	1,000 00
Minnesota	3,000 00	4,855 00	.....	7,855 00
Mississippi	1,500 00	.....	1,000 00	2,500 00
Missouri	982 50	.....	800 00	1,782 50
Nebraska	2,547 50	.....	200 00	2,747 50
New Hampshire	2,000 00	.....	.....	2,000 00
New York †	2,918 00	.....	.....	2,918 00
North Carolina	1,375 00	.....	1,500 00	2,875 00
Ohio †	400 00	.....	.....	400 00
Oregon †	15,334 00	.....	.....	15,334 00
Quincy	1,500 00	.....	.....	1,500 00
South Carolina	1,000 00	.....	2,700 00	3,700 00
Springfield	2,000 00	.....	625 00	2,625 00
Tennessee	1,500 00	.....	2,800 00	4,300 00

1889. Sept. 1st. By cash on hand for domestic missions and specials	$58,050 20
1890. Sept. 1st. By cash received since Sept. 1st, 1889, on account of domestic missions (including $25,072.04 for Indian missions, and $19,012.26 for colored missions)	147,736 85
One-half the general offerings to the society	25,939 93
Legacies for domestic missions	34,478 12
Specials	43,547 67
Withdrawn from deposits with standing committee on trust funds for Episcopate endowment funds of Colorado and Oregon	22,000 00
Transfers	55 00
Overdraft for domestic missions covered by amount to be withdrawn after Sept. 1st from temporary deposit of legacies with standing committee on trust funds	23,000 85

Texas	943 82	500 00	1,443 82	
Virginia	9,200 00	300 00	8,898 57	
West Virginia	175 00		175 00	
Western Michigan	1,325 00		1,325 00	
Legacies of estate during the year				3,350 00
The commission				
	130,097 34	10,370 25	38,764 25	219,997 84
Special				11,416 23
Paid from deposits with standing committee on trust funds for				
Epiphany endowment funds of Colorado and Oregon				222,000 00
One-half cost of administration and collection:				
Salaries				4,753 00
Rent of missionary rooms				1,975 00
Rent of departments				1,302 91
Domestic departments				1,244 02
Office expenses				1,768 18
Miscellaneous expenses				102 20
Legacy expenses				211 83
Travelling expenses (including for Miss Carter, $111.70)				122 63
Systematic offering plan				
				12,001 07
Printing reports of the board, Spirit of Missions for the clergy, pamphlets and leaflets for gratuitous distribution			4,302 93	17,303 10
Legacies:				
For church buildings, as received				881 84
Appropriated by board of managers to diocese of Spring- field				3,005 81
Temporary deposit with standing committee on trust funds				50,000 00
				53,917 15
				$355,511 62

GEORGE BLISS, *Treasurer.*

New York, September 1st, 1890.

* Post chaplaincy.

† For deficiencies in salaries in the West and South respectively.

‡ For deficiencies in salaries in the West and South respectively.

§ Including $2,000 for each Colorado and Oregon, from the general funds of the Society for the Endowment of the Episcopate.

Statement of Receipts and Payments for Foreign Missions from September 1st, 1889, to September 1st, 1890.

1889.		
Sept. 1st. To cash paid out since Sept. 1st, 1889, on account of—		
Mission to Greece	$2,937 84	
" Africa	38,518 15	
" China	67,703 30	
" Japan	58,690 23	
Haitien church	8,554 74	
Salary and travelling expenses of Rev. W. B. Gordon, Mexico	3,050 00	
		179,344 25
Specials for Africa	5,575 67	
" China	1,859 31	
" Japan	4,270 98	
" Haitien church	844 76	
" Foreign missionaries' fund (*a*)	1,241 79	
" Jane Bohlen "book fund"	259 43	
Other specials	564 00	
		14,612 94
One-half cost of administration and collection:		
Salaries	6,753 00	
Rent of mission-rooms	1,075 00	
Woman's department (*b*)	1,502 91	
Office expenses (*c*)	1,244 02	
Missionary-box expenses (*d*)	1,768 17	
Legacy expenses	163 50	
Travelling expenses (including for Miss Carter, $114.79)	241 84	
Systematic offering plan	122 62	
	12,964 06	
Printing reports of the board, Spirit of Missions for the clergy, pamphlets and leaflets for gratuitous distribution	4,562 03	
		17,523 09
To balance at credit for foreign missions and specials		13,743 71
		$225,223 97

1889.		
Sept. 1st. By cash on hand for foreign missions and specials		$35,819 09
1889.		
Sept. 1st. By cash received since Sept. 1st, 1889, on account of—		
Mission to Africa	$11,412 84	
" China	13,908 72	
" Japan	18,741 67	
Salary and travelling expenses of Rev. W. B. Gordon, Mexico	2,070 19	
General fund for foreign missions	75,734 02	
One-half the general offerings to the society	25,939 93	
Legacies for foreign missions	6,544 03	
Undesignated legacies to the society applied to foreign missions by order of the board of managers	13,801 75	
		168,753 15
Specials for Africa	8,068 98	
" China	3,139 33	
" Japan	5,056 08	
" Haitien church	787 48	
" Foreign missionaries fund (*a*)	1,474 90	
" Jane Bohlen "book fund"	411 56	
Other specials	1,492 40	
		20,430 73
Transfers		221 00
		$225,223 97

New York, September 1st, 1890.

GEORGE BLISS, *Treasurer.*

(*a*) Contributed by the woman's auxiliary for insurance on the lives of married missionaries.
(*b*) Salary of the secretary and assistant, printing, postage, and stationery.

Gifts, bequests, and securities other than money in charge of the treasurer:

One lot in Detroit, Michigan, from the estate of [illegible]	$250 00
Lots 5, Block 1st, Lincoln Addition, Detroit, Mich.	
Lots 5, Block 1st, Lincoln Addition, Detroit, Mich., from estate of [illegible] Hartford, Conn.,	
Two houses and lot, Duquesne, half, $8,000	11,000 00
Chester Alden, Duquesne, half, foreign, half, $8,000	
Bishop Riley's note, extended to date 1st, 1884	5,218 50
Interest to September 1st, 1890	5,611 61
	10,050 11
	$22,330 29

Mission-rooms, New York, Sept. 1st, 1890.

(Signed) GEORGE BLISS,
Treasurer.
E. WALTER ROBERTS,
Assistant Treasurer.

245 *Legacies Received from September 1st, 1889, to September 1st, 1890.*

	Domestic.	Foreign.	Not designated.
Albany, Cairo, estate of Miss Charlotte Austin	$8,118 42		
Conn., Bridgeport, estate of Miss Wealthy Ann Hunt			$8,760 75
Conn., Bridgewater, estate of Rev. Wm. B. Colburn, D. D.		$833 40	
Delaware, Wilmington, estate of Mrs. S. M. Du Pont (balance)			50 00
Mass., Boston, estate of Miss Helen Gordon			5,000 00
N. J., Freehold, estate of Mrs. Louisa S. Vought	10,057 68		
Pa., Philadelphia, estate of Rev. James Saul, D. D., domestic, $5,192.52; colored, $5,192.51; foreign, $5,192.51	10,385 03	5,192 51	
Pa., Philadelphia, estate of Mrs. Cornelia B. Williams, Church of the Saviour, domestic, $538.13; Indian, $215.25; foreign, $538.12	753 38	538 12	
Pa., Wyncote, estate of Mrs. Mary Ann Hewett			25 00
Springfield, Waverly, estate of S. G. M. Allis, for colored missions	3,163 61		
W. N. Y., Rochester, estate of Mrs. Frances Hunter Wilder	2,000 00		
Totals	$34,478 12	$6,511 03	$13,835 75

Comparison of Contributions.

Received for domestic missions to Sept. 1st, 1889	$138,166.34	to Sept. 1st, 1888	$147,726.81*
Received for foreign missions to Sept. 1st, 1889	110,157.89	to Sept. 1st, 1888	122,467.46†
Received for general missions to Sept. 1st, 1889	50,574.35	to Sept. 1st, 1888	51,870.27‡
Total for missions to Sept. 1st, 1889	$298,897.78	to Sept. 1st, 1888	$322,064.54
* Increase			$9,759.53
† Increase			12,310.43
‡ Increase			1,296.81
Increase			$23,166.76

The number of contributing congregations is 2,435. Last year the number of contributing congregations was 2,462.

Real Estate Held by the Society.

School-house and ground, Clover Depot, Va., in trust. (No income. Value unknown.)
One lot in Detroit, Michigan, awaiting sale. Estimated value $350 00
Two tenements in Hartford, Conn. Estimated value 11,000 00

New York, September 1st, 1890.

GEORGE BLISS, *Treasurer.*

246 *Statement of Receipts and Payments for the Spirit of Missions.*

September 1st, 1889, to September 1st, 1890.

1890.		
Sept. 1st.	By cash received from subscriptions	$3,962 82
"	received for extra pages, copies to the clergy, etc.	5,904 75
"	received for advertisements	1,492 06
	Overdraft	534 12
		$11,893 72

CONTRA.

1889.		
Sept. 1st.	Overdraft	$983 62
1890.		
Sept. 1st.	To cash paid for printing and delivery	8,821 10
"	" salaries	1,550 00
"	" cuts and electrotypes	188 70
"	" postage and stationery	349 30
"	" subscriptions returned	1 00
		$11,893 72

E. & O. E.
Mission-rooms, New York, September 1st, 1890.

GEORGE BLISS, *Treasurer.*

Statements of Receipts and Payments for the Young Christian Soldier.

September 1st, 1889, to September 1st, 1890.

1889.		
Sept. 1st.	By cash on hand	$357 76
1890.		
Sept. 1st.	By cash received from subscriptions	12,788 01
		$13,145 77

CONTRA.

1890.		
Sept. 1st.	To cash paid for printing and delivery	$9,657 64
"	" salaries of associate editor and clerks	1,850 00
"	" literary contributions	631 50
"	" cuts and electrotypes	468 72
"	" postage, stationery, etc.	182 08
"	" subscriptions returned	24 50
	To cash on hand	331 33
		$13,145 77

E. & O. E.
Mission-rooms, New York, September 1st, 1890.

GEORGE BLISS, *Treasurer.*

247 In connection with his report the treasurer offered the following preamble and resolution:

Whereas, the general missions offerings and the general legacies having been equally divided there will still remain a deficiency of about $18,000 in the foreign department, while there will be a surplus of about $10,000 in the domestic department; therefore,

Resolved, That the surplus in the domestic department be applied toward meeting the deficiency in the foreign department.

The foregoing preamble and resolution being under discussion,

the Rev. Dr. Hoffman moved to amend by striking out the whole and substituting the following:

Resolved, That the whole amount received for general missions, $13,800, be applied to the foreign work.

Question being put, the substitute was adopted.

The remainder of the treasurer's report, "Appropriations and resources," as completed by the foregoing action, is as follows:

248

Appropriations and Resources.

September 1st, 1889, to September 1st, 1890.

(A) Domestic missions:

Balance of appropriations to September 1st, 1889, unpaid		$37,822 20
Appropriations to September 1st, 1890, including one-half central expenses, less lapsed balances		219,635 75
		$257,458 05
Cash, September 1st, 1889, for domestic missions	$15,933 26	
Bonds available in hands of standing committee on trust funds, subject to order of board of managers (market value)	21,500 00	
Received for domestic missions (less offerings for colored missions)	128,724 50	
One-half general offerings	25,939 93	
	$192,097 78	
Legacies for domestic missions applied toward the appropriations, by order of the board of managers	65,360 27	
		257,458 05

(B) Foreign missions:

Balance of appropriations to September 1st, 1889, unpaid		31,477 20
Appropriations to September 1st, 1890, including one-half central expenses, less lapsed balances		180,558 80
Appropriations from legacies for building purposes		11,450 00
		$223,486 20
Cash, September 1st, 1889, for foreign missions	$10,076 30	
Bonds available in hands of standing committee on trust funds, subject to order of board of managers (market value)	20,912 50	
Received for foreign missions	122,467 41	
One-half general offerings	25,939 93	
Foreign legacies appropriated for building purposes	11,450 00	
	190,846 17	
Legacies applied toward the appropriations, by order of the board of managers:		
Legacies for foreign missions	$7,497 08	
Undesignated legacies to the society	13,801 75	
	21,298 83	
		212,145 00
Excess of appropriations over resources September 1st, 1890		$11,341 20

New York, September 1st, 1890.

GEORGE BLISS, *Treasurer.*

249 RESPONDENTS' EXHIBIT J.

July 11, 1895.

W. D. Anderson, Sp'c'l Ex'r.

In the Orphans' Court of Philadelphia County.

Estate of JAMES SAUL, Deceased.

The accounts of Benjamin Watson, D. D., and Henry C. Thompson, executors, *was* called for audit before Ashman, J., November 4, 1889.

Counsel appeared as follows: Henry C. Thompson, Esq., and Rev. Benjamin Watson, D. D., the accountants, attended in person.

By his second codicil, dated December 11, 1885, to his will, Rev. James Saul, the testator, gave his entire estate to the Domestic and Foreign Missionary Society of the P. E. Church in the United States of America. He died Nov. 16, 1887.

Vouchers were produced for the credits claimed in the annexed account, and the distributive balance was shown to be		$15,803.70
Less pd. filing and advertising	$23.50	
" " Dr. Rob't C. Moon, services	52.00	
Less pd. clerk's costs	15.00	
		90.50
		$15,713.20
Less collateral inheritance tax to be paid to the register.		785.66
		$14,927.54

which is awarded to the Domestic and Foreign Missionary Society of the P. E. Church in the United States of North America.

And, now, November 5th, 1889, the account is confirmed *nisi*.

W. M. ASHMAN.

250 The account of the Rev. Benjamin Watson, D. D., and Henry C. Thompson, executors of the will of the Rev. James Saul, late of the city of Philadelphia, in the State of Pennsylvania, deceased.

The said executors charged themselves with the estate of said decedent as per inventory	$17,268.03
and with—	
Dividend, United R. R.	125.00
No. Penn	100.00
United R. R.	62.50
No. Penn	100.00
United R. R.	62.50
No. Penn	100.00
J. A. Freeman, furniture	6.89
	$17,824.92

And claimed credit for cash paid	$821.50	
Reg. of wills for letters	6.50	
Allr. in ing. and leg. int	41.00	
P. L. Hay, services	125.00	
Undertaker	11.00	
Alt. Gibson, tailor	2.00	
Ack. of sale	0.00	
Episcopal hospital	318.57	
Undertaker	62.00	
Allen, Lane & Scott	162.00	
Van Gunden & Young, marblemen	380.75	
Ex.'s commissions	890.90	
		2,021.
Balance		$15,863.

BENJAMIN WATSON,
H. C. THOMPSON, *Executors.*

251 Henry C. Thompson, one of the above-named executo being duly sworn, doth depose and say that the above accou is true.

H. C. THOMPSON.

Sworn and subscribed before me this 26th day of September, 18
R. DALE SPARHAWK.
[SEAL.] *Notary Public.*

Written on side of bill: "$23.50 paid for filing acc't."

October Term, 1889.

Estate of JAMES SAUL, Dec'd. 167.

H. C. Thompson. Oct. 28, 1889. Acc't of Benjamin Watson *d* executors, filed 1889; November 5th, confirmed *nisi*. Adjudicati filed. 1889, November 23d, confirmed absolutely.

STATE OF PENNSYLVANIA, } ss:
Philadelphia County, }

I hereby certify the foregoing to be a true and accurate copy the accounts of Benjamin Watson, D. D. and Henry C. Thompso executors of the will of Rev. James Saul, dec'd, and of the adju cation thereon, and also of the docket entries as the same appears record in the office of the clerk of the orphans' court of said coun and that same were confirmed absolutely on November 23rd, 18

Witness my hand and seal of said court this 14th day of Marc 1892.

WILLIAM G. SHIELDS,
[SEAL.] *Clerk of Orphans' Court.*

252 STATE OF PENNSYLVANIA, } ss:
Philadelphia County, }

I, William B. Hanna, president judge of the orphans' court of Philadelphia county, do certify that the foregoing certificate and attestation, made by William G. Shields, Esq., register of wills and *ex officio* clerk of said orphans' court, his name thereto subscribed and seal of said court affixed are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand this 14th day of March, in the year of our Lord one thousand eight hundred and ninety-two (1892).

WILLIAM B. HANNA, [L. S.]
President Judge.

STATE OF PENNSYLVANIA, } ss:
Philadelphia County, }

I, William G. Shields, Esq., register of wills and *ex officio* clerk of the orphans' court of Philadelphia county, do certify that the Honorable William B. Hanna, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof and still is, president judge of the orphans' court of Philadelphia county, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 14th day of March, in the year of our Lord one thousand eight hundred and ninety-two (1892).

WILLIAM G. SHIELDS,
[SEAL.] *Register of Wills and ex Officio Clerk of the Orphans' Court.*

253 United States Circuit Court, Southern District of New York.

JAMES HOLLY
vs. } In Equity.
DOMESTIC AND FOREIGN MISSIONARY SOCIETY.

Henry C. Thompson was a lawyer and real-estate agent in Philadelphia, and was an executor of the estate of James Saul, of Philadelphia, and had in his hands as such about $15,000, devised and decreed to the defendant, of New York. The plaintiff gave him a check for $12,000, and a receipt for $200 advanced, to pay for a house which the plaintiff had bargained for. He immediately deposited the check in another bank, where he had about $4,000 more, gave his check on that bank to the defendant for $15,577.54, and took a receipt as "from executor's estate James Saul" for that amount, without further specification. When the plaintiff learned where his money had gone to he demanded it of the defendant, and brought this suit to reach it.

Principles adequate for the decision of this case are found as understood, in Brown *vs.* Smith, 3 How., 763, and National Bank *vs.*

Insurance Co., 104 U. S., 54. In the former case the defendant ha
collected a draft belonging to the plaintiff, received from a perso
who had received it from the plaintiff, and credited the proceeds
the person from whom the defendant received it on an account b
fore due, without any knowledge that it belonged to the plainti
or did not belong to him. The plaintiff there was held to be e
titled to recover, at law, because the money belonged
254 him, and no new transaction had arisen between the defen
ant and the one from whom he received it, but the creditin
of it on the previous debt. The defendant here is in the same si
uation in respect to this money, except that the money was deli
ered in breach of trust, which is no betterment. In the latter, aft
a thorough examination of the cases, money is said to be recover
ble by the true owner so long as it is traceable, and its possessio
with liability of its recovery has wrought no disadvantage.

Thompson had with the plaintiff's check of $12,000 an appare
credit in the Union Trust Co. of $17,158 60, and drew one check
$42 and another of $50 on the same day that he drew the check f
the defendant, but whether either or both before or after that o
does not appear, but if after, he had an apparent credit not draw
against of $17,066.60, which would leave $1,489.06 after that che
of $15,577.54 was drawn, and which might as well be a part of t
plaintiff's as of any other money, and that amount of other mone
as well drawn against as the plaintiff's, but, if all was so the che
must have been drawn against at least $10,326.94 of the plaintiff
money. Afterwards but $104 35 was deposited, and a check
$507.58 was drawn, and, with these two checks of $42 and $50, pa
before the check to defendant was paid, and after that was paid
balance of $885.35 was left to the credit of Thompson. The
checks may as well have been paid from, and this balance as we
left of, the plaintiff's, as any other money, and so reckoning the
all, there still remains $10,028 82 of the money that went to t
defendant, which came directly from, and belonged to, the plainti
This tracing accords to the defendant full advantage of the fa
that neither money itself nor bank credit for money has any ca
marks, and puts upon the plaintiff the burden of showing what
his money must actually have come into the hands of t
255 defendant by allowing for all that from want of car-marks
confusion of credits may have in any manner gone el
where.

In National Bank *vs.* Insurance Co., 104 U. S., s. 54, Mr. Justi
Matthews said, at page 69, in giving a reason for a dissent of S
George Jessel, master of the rolls, from Lord Ellenborough, "f
equity will follow the money, even if put into a bag or undisti
guishable mass by taking out the same quantity. And the doctri
that money has no car-mark must be taken as subject to the app
cation of this rule."

The plaintiff, before learning where his money had gone
undertook by legal proceedings to collect it of Thompson. This
claimed to be such an election of rights or remedies as to prevc
recovery of the defendant afterwards. The defendant does not a

pear to have been induced by that to do, or leave undone, anything otherwise than was done, or to have been in any way affected by that course which, if it had been successful, would have been advantageous to the defendant. In National Bank *vs.* City Bank, 103 U. S., 668, the plaintiff sought to recover for negligently delivering wheat to an elevator belonging to A. F. Smith & Co., drawers of drafts secured by bills of lading, which was followed and partly recovered after it had been drawn out of the elevator and forwarded to others. As to this, Mr. Justice Miller, in delivering the opinion of the court, said: "Some question is made in the argument as to the effect of proceedings taken by plaintiff to recover the wheat or its value of parties who bought or received it from A. F. Smith & Co. It is only necessary to say, if the jury shall be of opinion that defendant was negligent in delivering the wheat to A. F. Smith & Co., it is responsible to plaintiff for the amount of the unpaid drafts less any sum not actually recovered from others." Here the plaintiff recovered nothing of Thompson, and there is nothing to be deducted. Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond
256 reach, and cannot be recovered. But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in furtherance of its objects, nor that any of this particular money was applied to any of its purposes.

As the defendant retained the money after notice that it was the plaintiff's, and claimed by him, interest upon it follows from that time.

Decree for plaintiff for $10,028.82, with interest.

HOYT H. WHEELER.

Arthur M. Burton, Cephas Brainerd, for plaintiff; Julien T. Davies, Herbert Barry, for defendant.

(Endorsed:) United States circuit court, south. dist. New York. James Holly *vs.* Domestic & Foreign Missionary Society. Opinion, Wheeler, J. U. S. circuit court. Filed Mar. 1, 1898. John A. Shields, clerk.

257 At a stated term of the circuit court of the United States of America for the southern district of New York, held in the post-office building in the city of New York on the sixth day of April, 1898.

Present: Hon. Hoyt H. Wheeler, judge.

JAMES HOLLY
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTestant Episcopal Church in the United States of America and E. Walter Roberts.

This cause coming on regularly to be heard upon the bill and answer and all the other pleadings, papers and proceedings herein,

and upon the proofs submitted, and having been argued by counsel, and due consideration being had thereon:

Now, on motion of Cephas Brainerd, Esq., attorney for complainant, it is hereby—

Adjudged and decreed that the complainant, James Holly, do recover of the respondent The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, the sum of ten thousand twenty-eight and $\frac{82}{100}$ dollars, with four thousand six hundred forty-one and $\frac{62}{100}$ dollars interest thereon from the 19th day of July, 1890, amounting to fourteen thousand six hundred seventy and $\frac{44}{100}$ dollars, together with the costs of this action taxed by the clerk of this court at six hundred and seven and $\frac{98}{100}$ dollars, making in all the sum of fifteen
258 thousand two hundred seventy-eight and $\frac{42}{100}$ dollars, and that he have execution therefor.

(S'd) HOYT H. WHEELER.

(Endorsed:) Circuit court of the United States, southern dist. of N. Y. James Holly against The Domestic & Foreign Missionary Society, &c., & ano. Decree and notice of settlement. Cephas Brainerd, att'y for complainant, 47 Cedar street, N. Y. city. Due and timely service of a copy of within proposed decree & notice is hereby admitted this 30th day of March, 1898. Davies, Short & Townsend, respondents' solicitors. U. S. circuit court. Filed Apr. 6, 1898. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

JAMES HOLLY, Complainant, *against* DOMESTIC AND FOREIGN MISSIONARY Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts, Defendants.	In Equity. No. —. Assignment of Errors.

Now, on the — day of ——, 1898, comes the defendant, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States, by Davies, Short & Townsend, its solicitors, and says, that the decree in the said cause is erro-
259 neous and against the just rights of the said defendant, for the following reasons:

First. Because the learned trial judge, in deciding this cause, has proceeded upon the assumption and theory that even though Henry C. Thompson, on the 19th day of June, 1890, was indebted to the defendant Missionary Society in an amount equal to or greater than the sum of $15,577.54, in payment of which he gave on that day his check upon the Union Trust Company of Philadelphia, for that sum to said defendant, which was received by said defendant, in good faith and without notice of any equity or claim on the part of the complainant, yet, if the money so received by the defendant Mis-

ionary Society from Henry C. Thompson was made up in part of moneys by him received from the complainant for a specific purpose and misapplied, in such case the complainant is entitled to recover from the defendant Missionary Society the amount of money so misapplied by Thompson and received by the defendant society; and that such assumption and theory and the decision made thereon by the learned trial judge are erroneous.

Second. In rendering his decision, the learned judge below proceeded upon the theory and assumption that the defendant Missionary Society was not entitled to retain as against the complainant the proceeds of the check received by it from Thompson, because it was received merely in payment of an antecedent debt, and such assumption and theory are erroneous.

Third. Because the learned trial judge has apparently decided the cause upon the theory that the defendant Missionary Society did not receive and collect the check or draft of Henry C. Thompson upon the Union Trust Company of Philadelphia, for
260 value and without notice of any alleged equity on the part of the complainant; whereas, the evidence establishes such fact beyond dispute.

Fourth. Because the evidence showed that the defendant Missionary Society received the check of the said Thompson for value, and without notice.

Fifth. In the decision of this action, the learned trial judge says: "Some suggestion was made that this was received as a charitable bequest and so applied that it had gone beyond reach and cannot be recovered. But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul or otherwise than as it would use its general funds in furtherance of its objects; nor that any of this particular money was applied to any of its purposes."

That the statement that the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, and the statement that it is not shown that any of this particular money was applied to any of the purposes of the defendant, is not supported by the evidence, is in conflict therewith and is further erroneous as matter of law in that the rule relative to the application of payments from a fund under such circumstances as are here presented is ignored or misapplied.

Sixth. Because the evidence showed that the defendant Missionary Society, being the innocent holder for value of the said check, disposed of the proceeds thereof before receiving notice of the complainant's claim.

Seventh. Because the learned trial judge in rendering his decision and decree assumed that upon the evidence the proceeds of the complainant's check given to Henry C. Thompson could be
261 traced into the hands of the defendant Missionary Society; whereas, there was no competent evidence upon which any such fact could be predicated.

Eighth. Because the learned trial judge assumed that it appeared from the evidence that there were in the hands of the defendant

Missionary Society, on the 17th of July, 1890, the sum of $1,028.82, derived from the proceeds of the check given by the complainant to Henry C. Thompson, on the 19th day of June, 1890; whereas, there was no competent evidence upon which such statement of facts could be predicated; and whereas, it clearly appeared from the evidence that such was not the fact.

Ninth. Because it appears from said decree that the testimony and exhibits below specified, offered in evidence on behalf of the complainant, against the objection of the defendants, were received in evidence by the court, to wit:

Exhibit C, which was a book alleged to be the bank book showing the account of said Thompson, who was not a party to this suit, with the Union Trust Company, which exhibit is as *as* follows:

COMPLAINANT'S EXHIBIT C.

C. C. U. S., So. Dist. of New York.

HOLLY
vs.
DOMESTIC & FOREIGN MISS'Y SO. } Ex. C.

March 12, '92. Samuel Bell, Sp. Ex'r.

(See p. 57, fols. 42 and 43.)

The Bank Book of the Union Trust Co., 611 & 613 *Chestnut Street, Philadelphia, in Account with H. C. Thompson*, 1001 *Chestnut.*

262 Stipulations.

Checks upon this account payable on call.

Interest at the rate of 2 per cent. per annum will be allowed on all deposits to this account.

The company reserves the right to close any account.

Leave book for settlement and credit of interest, April & October.

(The account is opened as follows:)

DR.	CR.
The Union Trust Company of Philadelphia.	H. C. Thompson, 523 Chestnut.

1885.
Feb'y 14. C..... ... $500

(Closed.)

1890.
7/30. Balance..... $72 41

Exhibit D, which was an alleged day book, alleged to show the daily receipts and expenses of said Thompson, of which so much was offered in evidence as follows:

JUNE, THURSDAY, 19, 1890.

Est. Jas. Robinson.	Paid Maule comm....	.....		100 00
	Per Maule ½ "	50 00		
Est. Jas. Saul.	P. E. Miss.....	.....	.....	15,577 54
R. E. Title Co.	Trego note (judgment)....	.....		507 58
James Holly.....	.....	12,000 00		
James Robinson ac't Mary Grew, Jr.....		1,500 00		
Jos. W. Robinson...	.....	1,500 00		
Union Tr. Co.....	.....	.....	.....	15,000 00

263 Complainant's "Exhibit No. 2, March 19, 1892," which was an alleged copy of the bank account of the said Thompson with the said Union Trust Company.

COMPLAINANT'S EXHIBIT NO. 2.

March 19th, 1892.

C. C. U. S., So. Dist. of New York.

HOLLY
vs.
DOMESTIC & FOREIGN MISSIONARY SOCIETY.

Balance-sheet.

Henry C. Thompson in ac. with the Union Trust Co.

1890.			
May 21.....	$422 00	$86 63	$508 63
	165 00	50 00	
22.....	750 00	35 45	
	———	———	1,000 45
23.....	.....	.....	300 00
26...	.....	.....	175 00
28..... ..	.....	.....	67 50
June 2.....	500 00	16 80	516 80
	75 00		
4.....	50 00	50 00	
	———	———	175 00
5.....	.....	.....	48 17
6	... ...	.....	150 00
7.....	.....	... .	711 83
14.....	.....	.....	86 63
16.....	200 00	200 00	400 00
18.....	.....	.....	924 95
19.....	.....	.....	4,066 67
	50 00	42 00	
21.....	507 58	15,577 54	
	———	———	16,177 12
23...	.....	.....	250 00
24.....	100 00	7,661 25	
	15 00	10 00	
	———	———	7,786 25

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	26	15 00	50 00	65 00	
	27			280 00	
	28		20 00		
			10 00		
				30 00	
	30			33 00	
July	2		10 00		
			103 77		
				113 77	
		447 50			
	3	7 50	302 83		
				757 83	
	5	42 00	1,426 14	1,468 14	
	7	215 00	29 75	244 75	
	9			35 50	
	12			350 00	
	15			10 00	
		Balance		79 01	
					$836,812 00

1890.

May	17.	By balance	$735 71
	19.	" cash	500 00
	22.	" "	987 00
	23.	" "	300 00
	29.	" "	1,471 60
	31.	" "	514 68
June	6.	" "	506 92
	10.	" "	1,674 32
	16.	" "	4,500 00
	19.	" "	15,000 00
	20.	" "	104 35
	24.	" int. to June 1	10 37
	24.	" cash	8,000 00
	30.	" "	333 34
July	1.	" "	287 50
	2.	" "	1,879 61
Dec.	23.	" int. to Dec. 1	6 60
			$836,812 00

1891.

J'e	1.	By balance	879 01

The testimony of HENRY C. THOMPSON, JR., a witness examined in behalf of complainant, who testified, among other things, as follows, against the objection of defendants:

Q. Did you know of your father being one of the executors of the estate of Rev. James Saul, deceased?

Objected to.

A. Yes, sir.

Q. As assignee for the benefit of creditors, have you examined the books of Mr. Thompson and his bank accounts a view of ascertaining whether any funds of Saul's estate were deposited in this bank account with the Union Trust Com-
?

bjected to as irrelevant and incompetent testimony.

. I have in a very cursory way in the presence of Mr. Hannis Mr. Burton at my office last Saturday. I have here an account he Saul estate taken from Mr. Thompson's books. This is an unt of the moneys received and distributed by my father in matter of the estate of James Saul. Last Saturday, Mr. Bur-, Mr. Hannis and myself were in my office with this account ore us.

bjected to, as to all that occurred relating to the books.

The WITNESS: We had this account before us and the bank books the Union Trust Company, with the book of the Sixth national nk, the pass book M of the Sixth national bank. I think that all items on the credit side of the account, that is, the receipts, with exception of the first one, $2,493.03, corresponded with the de-its made as shown by the pass book of the Sixth national bank. n reference to the first item we did not have the pass book of the th national bank for that date, December 29, 1887. That item $2,493.03. I have been unable to lay my hands on that pass ok. The day book of December 29, 1887, however, shows that ount of money deposited in the Sixth national bank, by a morandum in Mr. Thompson's handwriting on that date. To t extent I have examined the books to ascertain in what banks Saul money was deposited.

Q. My question is, Did any money of Saul's estate, from your amination, appear to have been deposited in the bank account of . Thompson with the Union Trust Company?

bjected to.

A. No, sir.

Tenth. Because there was no competent evidence to show that y money of the complainant ever came into the hands of the defendant Missionary Society.

Eleventh. Because there was no evidence to show that the complainant was entitled to recover from the defendant ssionary Society the sum of $10,028.82, with $4,641.62 interest reon, or any sum whatever.

Twelfth. Because the evidence showed that prior to the institu-n of this suit, the complainant had elected to sue one Henry C. ompson for the moneys sought to be recovered in this suit, as a ot due to him from said Thompson, and he was thereby estopped m maintaining this suit against the defendant herein.

Wherefore said defendant Missionary Society prays that the said

decree be reversed, and that the said court may be directed a decree dismissing the complainant's bill, with costs.

DAVIES, SHORT & TOWNSEN
Solicitors for the Def

(Endorsed:) United States circuit court, southern dist York. James Holly, complainant, against Domestic and Missionary Society, &c., and another, defendants. Assign errors. Davies, Short & Townsend, solicitors for def'ts, Life building, 32 Nassau street, New York city. U. S. circ Filed Jun- 8, 1898. John A. Shields, clerk.

267 Circuit Court of the United States for the Southern of New York.

JAMES HOLLY, Complainant,
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE estant Episcopal Church in the United States of Ameri E. Walter Roberts, Defendants.

It is hereby stipulated that the filing of the bond for cos stay execution on the defendants' appeal to the United Stat court of appeals from the judgment entered herein, be and hereby is waived.

Dated New York, May 6, 1898.

CEPHAS BRAINERD,
Solicitor for Compl
DAVIES, SHORT & TOWNSEN
Solicitors for Defe

Ordered accordingly.
E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit court of the U. S., so. dist. of N. Y. Holly against The Dom. & For. Miss. Soc'y of the Prot. E Ch. in the U. S. of America and E. Walter Roberts. Sti waiving bond and order. Davies, Stone & Auerbach, atto D. & F. So'y, Mutual Life building, 32 Nassau street, New Y U. S. circuit court. Filed Jun- 8, 1898. John A. Shields,

268 Circuit Court of the United States, Southern District of New York.

JAMES HOLLY, Complainant,
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF the Protestant Episcopal Church in the United States of America and E. Walter Roberts, Defendants. } In Equity.

To the honorable the judges of the United States circuit court of appeals for the second circuit:

The above-named defendant, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, conceiving itself aggrieved by the decree made and entered in the above entitled cause and filed in the office of the clerk of this court on the 6th day of April, 1898, does hereby appeal therefrom to the United States circuit court of appeals for the second circuit and prays that its appeal may be allowed and a citation issued directed to the above-named complainant, commanding him to appear before the United States circuit court of appeals for the second circuit for the reason, specified in the assignment of errors, which is filed herewith, to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause duly authenticated may be sent to the United States circuit court of
269 appeals for the second circuit, and that said decree of the circuit court may be reversed and such decree made as to the said circuit court of appeals may seem just.

DAVIES, SHORT & TOWNSEND,
Solicitors for Defendants.

Dated New York, June 6, 1898.

The foregoing claim of appeal is allowed.

E. HENRY LACOMBE,
Circuit Judge.

Dated New York, June 7, 1898.

(Endorsed:) United States circuit court, southern district of New York. James Holly against The Domestic and Foreign Missionary Society, &c., and E. Walter Roberts. Petition on appeal. Davies, Short & Townsend, attorneys for defendants, Mutual Life building, 32 Nassau street, New York city. A copy of within paper was this day received at this office. Dated New York, June 10, 1898. Cephas Brainerd, Jr., att'y. U. S. circuit court. Filed Jun- 11, 1898. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of
York.

JAMES HOLLY
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, &c., a
E. Walter Roberts.

It is hereby stipulated between the solicitors for th
270 spective parties in the above-entitled cause that the reco
appeal to the U. S. circuit court of appeals may consist o
following:

The printed copies of records of pleadings and proofs use
final hearing in the court below.

Decision of court below.
Decree thereon.
Assignment of errors.
Stipulation and order waiving bond.
Petition of appeal.
Citation.

New York, June 21, 1898.

CEPHAS BRAINERD.
DAVIES, SHORT & TOWNSEN

By the Honorable E. Henry Lacombe, one of the judges o
circuit court of the United States for the southern district of
York, in the second circuit.

To James Holly and Cephas Brainerd, Esq., solicitor for J
Holly, complainant, appellee, Greeting:

You are hereby cited and admonished to be and appear bef
United States circuit court of appeals for the second circuit, t
holden at the borough of Manhattan, in the city of New Yor
the district and circuit above named, on the first day of July,
pursuant to a petition on appeal filed in the clerk's office of th
cuit court of the United States for the southern district of New Y
wherein The Domestic and Foreign Missionary Society of the
estant Episcopal Church in the United States of America is a
lant and James Holly is appellee, and you are each of you to
cause, if any there be, why the decree in said petition menti
should not be corrected and speedy justice should not be don
that behalf.

271 Given under my hand in the city of New York, in the
trict and circuit above named, this seventh day of Jun
the year of our Lord one thousand eight hundred and ninety-e
and of the Independence of the United States the one hundred
twenty-second.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the
[SEAL.] *Southern District of New York, in the Second Circ*

(Endorsed:) United States circuit court of appeals for the second circuit. James Holly, complainant, appellee, *vs.* The Domestic and Foreign Missionary Society, &c., defendant, appellant. Citation. Due service of a copy of the within is hereby admitted this 10th day of June, 1898. A copy of within paper was this day received at this office. Dated New York, June 10th, 1898. Cephas Brainerd, Jr., att'y. U. S. circuit court. Filed June 11, 1898. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss.:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to two hundred and seventy *a* (270*a*) inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of James Holley, complainant and appellee, against The Domestic and Foreign Missionary Society of the *the* Protestant Episcopal Church in the United States of America and E. Walter Roberts, defendants and appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern
272 district of New York, in the second circuit, this 21st day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

JOHN A. SHIELDS, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit.

JAMES HOLLY, Complainant, Appellee,
against
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, &c., Defendant, Appellant.

It is hereby stipulated that in the preparation and printing of the record to be used upon the argument of the appeal to the United States circuit court of appeals, taken by the defendant from the judgment of the circuit court of the United States entered herein, all stipulations made in reference to the trial and argument of the case before the circuit court, and appearing in the printed records used upon the trial, shall be considered as made with reference to the pending appeal, and shall have the same force and effect as though new stipulations to the same effect were made in reference to the hearing upon said appeal. And it is

Further stipulated that any and all exhibits not printed in full in the said record used upon the trial of the cause in the circuit court need not be printed in full in the record upon the appeal to
273 the United States circuit court of appeals, but may be produced and used upon the argument of said appeal with the

same force and effect as if printed in full therein and subject
same stipulations made with reference to their use upon the
the cause, and such stipulations and this stipulation as well
included in the printed record upon appeal to the United
circuit court of appeals.

CEPHAS BRAINERD,
Attorney for Complainant, App
DAVIES, SHORT & TOWNSEND,
Attorneys for Defendant, Appe

(Endorsed:) U. S. circuit court of appeals for the second
James Holly, complainant, appellee, against The Domestic a
eign Missionary Society, &c., defendant, appellant. Stipu
(Original.) Davies, Stone & Auerbach, attorneys for def't, a
Mutual Life building, 32 Nassau street, New York city.
States circuit court of appeals. Filed June 21, 1898. W
Parkin, clerk.

274 United States Circuit Court of Appeals for the Second
October Term, 1898.

Submitted January 31, 1899; decided March 1, 1899.

JAMES HOLLY, Complainant, Appellee,
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY, ETC.,
Defendant, Appellant.

Appeal from the circuit court of the United States for the so
district of New York; before Judges Wallace, Lacombe, an
man.

WALLACE, *Circuit Judge:*

This is a suit brought to recover certain moneys received
defendant, The Domestic and Foreign Missionary Societ
through the check of one Thompson, upon the theory that th
was paid by the misappropriation of a trust fund in Thom
hands belonging to the complainant. The facts are thes
complainant employed Thompson as an attorney and conve
about the purchase of certain real estate, and June 19, 1890
ered to him a check for $12,000 with instructions to apply t
ceeds to the payment of the purchase-money. Instead of do
Thompson used the check as a credit item in his account w
Union Trust Company, and misappropriated the proceeds by
drawn by him on the trust company. Among these chec
one dated June 20th, 1890, for $15,577, payable to the order
missionary society.

Thompson was one of the executors of the estate of Jame
under whose will the missionary society was a legatee. A
of the probate court having jurisdiction in the premis
275 been entered in November, 1889, settling the accounts
executors and ordering payment of the legacy. Thom

co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the missionary society was cognizant of the facts. In the spring of 1890 the missionary society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the missionary society in substance that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson stating that he was going to New York to settle with the missionary society. The next day Thompson called at the office of the missionary society and delivered to its treasurer the check for $15,577, the amount being the sum due as principal and interest upon the legacy. The missionary society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below this check was to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the missionary society for that amount in favor of the complainant.

The proofs do not disclose any fact or circumstance tending to show that the missionary society supposed when it received Thompson's check that the check was not drawn against his own funds. The circumstance that the payment was made by his individual check, and not by that of the executors, was suggestive of irregularities in his conduct as an executor, but it does not seem to have created any suspicion of his integrity, and was not calculated to do so. There was no impropriety in his paying a debt of the estate with his own funds, if he saw fit to do so. The missionary
276 society undoubtedly received it in entire good faith. Upon these facts we are constrained to conclude that the complainant was not entitled to a decree.

The familiar doctrine, that the beneficial owner of trust property which has been misappropriated by his trustee is entitled to follow it in a court of equity through any transmutations in which it can be traced, and reclaim it in its new form, not only as against the trustee but also against any other person who has no better equitable title, applies to money which has been entrusted by a principal to his agent for a specific use, and which the latter has diverted. In the case of a principal, or of any person who has a legal title, the money is recoverable at law by an action for money had and received (United States *vs.* State Bank, 96 U. S., 35), and the interposition of equity is unnecessary. The old notion that money cannot be thus followed because it has no ear-marks has been exploded; though in many cases where it has been mingled with other moneys of the wrong-doer or been converted into other property the practical difficulty of identifying and following it is insuperable. Knatchbull *vs.* Hallett (13 Ch. Div., 696); McLarren *vs.* Brewer (51 Maine, 402);

Bresnihan *vs.* Sheehan (125 Mass., 11); Van Allen *vs.* American National Bank (52 N. Y., 1); National Bank *vs.* Insurance Co. (104 U. S., 54). Upon this doctrine undoubtedly the complainant was equitably entitled to follow his money into the hands of the Union Trust Company and reclaim it until it had been withdrawn by Thompson's check upon that company; and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights, and reclaim so much of it as could be traced into the check. But the missionary society was not a volunteer. It received the money innocently in discharge of a debt; and good conscience did not require it to restore the money to the complainant on subsequent information of his rights. Neither in equity, nor at law in an action for money had and received, can he whose trust moneys have
277 been perverted prevail against the title of one who has acquired them *bona fide* and for value. He who receives money or acquires negotiable paper in payment of a debt is a holder for value and if he receives the money innocently, or acquires the commercial paper before its maturity and without notice of any infirmity, has a perfect title which cannot be subordinated to the equities of any third person.

In the action for money had and received, which is controlled by principles of equity, and in which the general rule is that — the plaintiff is entitled to recover money *ex æquo et bono* the defendant ought to refund, there are many illustrations of the doctrine that a defendant who has received money innocently in payment of a debt is under no obligations to restore it, notwithstanding as between the plaintiff and the person from whom the defendant received it, it ought to be regarded as the money of the plaintiff. In Merchants' Insurance Co. *vs.* Abbott (131 Mass., 397) the plaintiff, an insurance company, paid a loss upon the order of one Abbott, the assured, to persons to whom the latter was indebted, and upon discovering that the loss was fraudulent brought the action against them to recover back the amount. The court held that the action would not lie, Gray, C. J., saying: "These defendants hold no money which *ex æquo et bono* they are bound to return either to Abbott or to the plaintiffs." In Miller *vs.* Race (4 Burr, 452) Lord Mansfield said: "Money shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business." In Mason *vs.* Wait (17 Mass., 563) the court said: "It would be mischievous to require of persons who receive money in the way of business, or in the payment of debts, to look into the authority of him from whom they received it." In Lime Rock Bank *vs.* Plimpton (34 Mass., 159) it was held that money of a principal misappropriated and lent by his agent to a creditor, the agent being indebted to the creditor in a larger sum, and the creditor receiving the money *bona fide*, could not be reclaimed by the principal, as in a suit by the principal the creditor could set off the agent's debt. The
278 court said that in respect to money the owner could not follow it, "not only because money has no ear-marks, but because a different doctrine would be productive of great mischief." In Justh

vs. National Bank of the Commonwealth (56 N. Y., 483) the court stated that if money which had been received in the regular course of business can be followed "the transaction of business must be stopped, for no security and no precaution could guard the receiver from responsibility." In Stevens *vs.* The Board of Education (79 N. Y., 187) the court used the following language: "It would introduce great confusion into commercial dealings if the creditor who receives money in the payment of a debt is subjected to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world."

Ever since the case of Smith *vs.* Tyson (16 Peters, 1) it has been the law of the Federal courts that the transferee of commercial paper, who receives it in payment or as security for an antecedent debt, is a holder for value. Railroad Co. *vs.* National Bank (102 U. S., 14); McMurray *vs.* Moran (134 U. S., 150). It is immaterial therefore whether the check received by the missionary society is treated as money, or as commercial paper; in either form, as it was taken *bona fide* and in payment of a debt, no part of the amount can be reclaimed by the complainant.

The following adjudications may be cited in support of the general proposition. State Bank *vs.* United States (114 U. S., 401) was a case in which by the connivance of a clerk in the office of an assistant treasurer of the United States one Carter unlawfully
279 obtained from that office money belonging to the United States, and to replace it delivered to the clerk money which he obtained by fraud from the plaintiff, the clerk having no knowledge of the fraud. The court held that the United States was not liable to refund the money. In Goshen National Bank *vs.* State of New York (141 N. Y., 379) the defendant, in payment of moneys due from a county treasurer, received a draft wrongfully and fraudulently drawn by him as cashier of the plaintiff upon another bank, the plaintiff's correspondent. In an action to recover the amount of the draft which the plaintiff had been compelled to pay to its correspondent, the court held that as the defendant had received the draft in good faith the plaintiff could not recover. The court said: "The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid instead of an order given for its payment." Hatch *vs.* National Bank (147 N. Y., 184) was a case in which a bank in good faith, in the ordinary course of business and without notice, had received from a customer checks of third parties, obtained by his unlawful pledge of the securities of the plaintiff, and the bank, pursuant to a continuing agreement with the customer to that effect, applied the checks in payment of an existing indebtedness against him. The court held that the bank was not liable to

refund the amount due to the owner of the securities. The court said: "If, therefore, Smith had come with the money, and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actually the proceeds of the stolen certificate," and added by Finch, J., "I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected."

The case of Swift *vs.* Williams (68 Md., 236) is cited by the appellee as an adjudication in his favor, and as sanctioning the proposition that the equitable owner of misappropriated trust funds can follow them into the hands of a creditor who has taken them
280 innocently in payment of a debt. We have been unable to find any other adjudication to this effect, and we regard the decision as a departure from principle and authority.

The decree is reversed with costs, and with directions to the court below to dismiss the bill.

Herbert Barry, for the appellant.

Arthur M. Burton and Cephas Brainerd, for the appellee.

281 At a stated term of the United States circuit court of appeals for the second judicial circuit, held in and for the southern district of New York, at the post-office building, in the city of New York, on the 13th day of March, 1899.

Present: Hons. William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

JAMES HOLLY, Appellee,
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT Episcopal Church in the United States of America and E. Walter Roberts, Appellants.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of the record of the circuit court of the United States for the southern district of New York and was argued by Herbert Barry, Esq., of counsel for the appellants, and Cephas Brainerd and Arthur A. Burton, Esqs., of counsel for the appellee; on consideration whereof it is now hereby—

Ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same hereby is, reversed with costs, and this cause is remanded to the said circuit court, with directions to dismiss the bill herein with costs.

W. J. W.
N. S.
E. H. L.

282 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 281, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James Holly, complainant, appellee, against The Domestic & Foreign Missionary Society, etc., defendant, appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 7th day of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal revenue stamp, cancelled 8, 7, '99. W. P., cl'k.]

283 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts are appellants and James Holly is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
284 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

285 [Endorsed:] Supreme Court of the United States. No. 409, October term, 1899. James Holly *vs.* The Domestic & Foreign Missionary Society of the P. E. Church in the U. S. *et al.* Writ of certiorari. United States circuit court of appeals, second circuit. Filed Nov. 3, 1899. William Parkin, clerk.

286 In the United States Circuit Court of Appeals for the Second Circuit.

JAMES HOLLY, Petitioner and Appellee,
vs.
THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE Protestant Episcopal Church in the United States of America and E. Walter Roberts, Respondents and Appellants. } No. 64.

Stipulation as to Return to Writ of Certiorari.

It is this 1st day of November, A. D. 1899, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause submitted to the Supreme Court of the United States on the 16th day of October, 1899, with the petition for a writ of certiorari may be filed in the said Supreme Court, and may be received and considered by that court as and for the transcript of the record in said

cause as though the same had been returned by the clerk of the circuit court of appeals for the second circuit in obedience to the writ of certiorari granted the 24th day of October, 1899.

CEPHAS BRAINERD,
Attorney for Petitioner and Appellee.
DAVIES, SHORT & TOWNSEND,
Attorneys for Respondents and Appellants.

287 [Endorsed:] In the U. S. circuit court of appeals for the 2nd circuit. James Holly, pet'r & appellee, *vs.* The Domestic & Foreign Missionary Society of the Protestant Episcopal Church, &c., resp'd'ts & appellants. Copy. Stipulation as to return to writ of certiorari granted 24th Oct., 1899. Cephas Brainerd, att'y for petitioner and appellee, 47 Cedar St., N. Y. city.

288 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 3, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[10-cent U. S. internal-revenue stamp, canceled 11, 3, '99. W. P.]

289 [Endorsed:] United States circuit court of appeals, second circuit. Holly *v.* Domestic & Foreign M. S. Return to writ of certiorari.

290 [Endorsed:] File No., 17,523. Supreme Court U. S., October term, 1900. Term No., 138. James Holly, petitioner, *vs.* The Domestic & Foreign Missionary Society, &c. Writ of certiorari and return. Filed Nov. 8, 1899.

SEP 28 1899
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 138

JAMES HOLLY, PETITIONER,

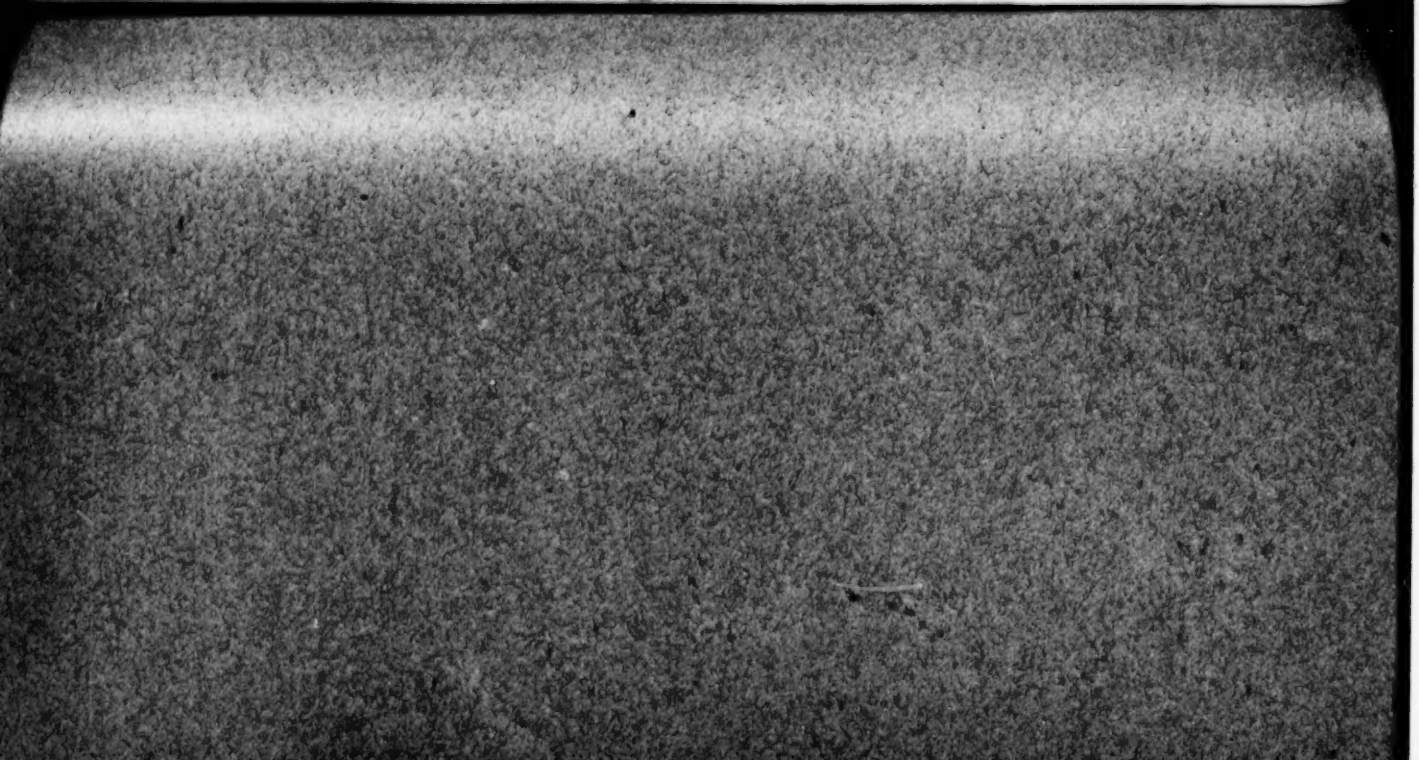
vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Notice of Motion and Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-28-99



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 409.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

NOTICE OF MOTION.

To The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts, the Above-named Defendants:

Please take notice that on Monday, October 16, 1899, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of certiorari, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at Washington, D. C., for the decision of the court thereon.

In support of said motion a petition and a brief will also be presented to the court. A copy of the petition and of the brief are herewith served upon you.

Respectfully, MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

NEW YORK, , 1899.

Due notice of the foregoing service of motion in the above cause is hereby admitted this day of A. D. 1899.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899. No. —.

JAMES HOLLY, *Petitioner,*

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA and E. WALTER ROBERTS.

Motion.

And now comes James Holly, the above-named petitioner, by Matthew Verner Simpson, Cephas Brainerd, and John G. Johnson, his attorneys and counsel, and moves this honorable court for a writ of certiorari, directed to the honorable the judges of the United States circuit court of appeals within and for the second judicial circuit, commanding

them forthwith to certify and return to this court all proceedings by them had in the suit lately before them, wherein this petitioner was complainant and appellee and the said The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts were defendants and appellants.

The matter involved herein relates to the right of your petitioner to establish against the defendants a trust in his favor for the amount of $12,000, which right has been denied by the United States circuit court of appeals for the second judicial circuit, which ordered petitioner's bill to be dismissed.

JAMES HOLLY, *Petitioner*,
By MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this day of , A. D. 1899.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899. No. —

JAMES HOLLY, *Petitioner; In Re* PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS IN AND FOR THE SECOND CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR REVIEW AND DETERMINATION THE CASE OF JAMES HOLLY, *Complainant and Appellee*,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA and E. WALTER ROBERTS, *Defendants and Appellants.*

To the Honorable the Supreme Court of the United States:

The petition of James Holly respectfully shows:

1. That petitioner is a resident of the State of Pennsylvania and the defendant The Domestic and Foreign Missionary Society is a corporation incorporated under the laws of the State of New York, and E. Walter Roberts a citizen of that State.

2. That the value of the matter in dispute in the above-entitled cause, as appears by the bill of complainant herein, exclusive of interest and costs, is the sum of $12,000.

3. That this suit was brought to recover certain moneys received by the defendants, The Domestic and Foreign Missionary Society and E. Walter Roberts, through the check of one Thompson, upon the allegation that the check was paid by the misappropriation of a trust fund in Thompson's hands belonging to the complainant.

4. That the facts relating to this matter may be briefly summarized as follows:

James Holly, a citizen of Philadelphia, employed Henry C. Thompson, an attorney-at-law and conveyancer, to examine the title to a property which Holly had purchased, and on approval of it to make settlement for the same with the vendor.

Prior to this, to wit, on December 23, 1887, letters testamentary were granted to said Thompson and Rev. Dr. Benjamin Watson, as executors of the will of James Saul, deceased, the Domestic and Foreign Missionary Society being named as sole residuary legatee. On the 26th day of September, 1889, the executors filed their account (Transcript of Record, p. 250), charging themselves with "the estate of said decedent as per inventory" and with dividends on the stock of the United Railway Association of New Jersey and of the North Penna. R. R. Company, in which said estate was invested, giving credit for their disbursements and showing a balance consisting of stocks to the credit of accountants of $15,800. By the adjudication of the orphans' court, filed on the 4th day of November, 1889, the whole residuary estate thus composed was awarded to the said society. Prior to the adjudication, though the fact did not then appear, Thompson had sold the said stocks, had embezzled all the funds of the said Saul estate, and there was no residuary estate in the hands of the executors at the time of the adjudication. The society never took any steps to enforce payment of the legacy, and only made occasional inquiries concerning it, being put off by Thompson with promises. On the evening of the 18th of June, 1890, his (Thompson's) co-executor requested him to exhibit the securities in which the estate was invested. Thompson promised to do this at one o'clock the next day.

On the morning of the 19th of June, 1890, Holly called upon Thompson to ascertain the state of his business, and was falsely informed by him that the papers were ready, and that he would have everything settled in a few days. He requested Holly to give him a check for the purchase-

money, and Holly immediately gave to Thompson, as his attorney, his check on the Fidelity Insurance, Trust and Safe Deposit Company, in the sum of $12,000, to be applied to the purchase of the said premises, 643 North Fifteenth street, and gave Holly a receipt, of which the following is a copy:

"PHILADELPHIA, June 19th, 1890.

"Received from James Holly twelve thousand dollars and J. A. Freeman's receipt of two hundred dollars, to be applied to purchase of house No. 643 N. 15th St.

"$12,000.

"(Signed) H. C. THOMPSON."

Thompson at once deposited this check in his private account with the Union Trust Company of Philadelphia, and immediately thereafter, **on the same day,** to wit, June 19, drew his check on said trust company for $15,577.54 to the order of the respondents, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church. **On this same day** he took this check to New York and delivered it to E. Walter Roberts, the assistant treasurer, at the office of the society in that city, about one o'clock p. m., and received the following receipt:

"NEW YORK, June 19th, 1890.

"Received from executors estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

"$15,577.54.

"GEORGE BLISS, Treasurer,
"Per E. WALTER ROBERTS,
"Ass't Treasurer."

The check was paid in due course by the said Union Trust Company on the 21st day of June, 1890.

At the time Thompson drew this check he had only about $4,000 to his credit in the said Union Trust Company over

and above the $12,000 belonging to the complainant. When his check was paid it left a balance to Thompson's credit of $826.03.

On July 17, 1890, Holly discovered Thompson's misappropriation of his money. He traced it into possession of the said society and immediately notified the latter of his claim. The money had been deposited by the respondents in the National Bank of New York, and was still on deposit in that bank to their credit at the time Holly notified them that it was his money.

5. There was no substantial conflict about the facts in the case, which were stated carefully in the opinion of Wheeler, J., who decided the case at the circuit court. The circuit court of appeals found the facts to be substantially uncontroverted. A copy of the opinion of the circuit court is hereto attached and marked Exhibit A, and a copy of the opinion of the circuit court of appeals is likewise attached, marked Exhibit B.

6. The circuit court held that upon the authority of Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Insurance Co., 104 U. S., 54, the complainant was entitled to a decree, and entered a decree against the defendant in the sum of $10,028.82, with interest.

The circuit court of appeals decided that—

"The beneficial owner of trust property, which has been misappropriated by his trustee, is entitled to follow it in a court of equity through any transmutations through which it can be traced and reclaim it in its new form, not only as against the trustee, but also against any other person who has no better equitable title, applies to money which has been entrusted by a principal to his agent for a specific use and which the latter has diverted. * * * Upon this doctrine, the complainant was undoubtedly entitled to follow his money into the hands of the Union Trust Company and reclaim it until it had been withdrawn by Thompson's

check on that fund, and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights and reclaim so much of it as could be traced into the check; but the missionary society was not a volunteer; it received the money innocently in discharge of a debt. And good conscience did not require it to restore the money to complainant on subsequent information of his rights."

7. The decision of the circuit court of appeals was rendered upon the supposed authority of the case of Swift *vs.* Tyson and kindred cases, which your petitioner respectfully submits does not sustain the reasoning of the court upon the facts which were clearly proved, and that said decision is opposed to the law as laid down in the case of Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Ins. Co., 104 U. S., 54, and kindred cases.

8. Two questions are presented:

First. Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner, where he does nothing more than give a naked receipt therefor?

This question is answered in the negative by the following cases:

National Bank *vs.* Ins. Co., 104 U. S., 54.
Brown *vs.* Smith, 3 How., 763.
Oliver *vs.* Piatt, 3 How., 333 and 401.
May *vs.* Le Claire, 11 Wall., 217.
Bayne *vs.* U. S., 93 U. S., 642.
U. S. *vs.* State Bank, 96 U. S., 30.
Manhattan Bank *vs.* Walker, 130 U. S., 267.
Jones *vs.* Van Doren, 130 U. S., 684, 691.
Peters *vs.* Bain, 133 U. S., 670, 694.
Swift *vs.* Williams, 68 Md. Rep., 236.
Pennell *vs.* Deffell, 4 De G. M. & G., 372 & 388.
Knatchbull *vs.* Hallett, 13 L. R., Ch. D., 696.

The defendant merely gave to Thompson a receipt for so much money, to wit, $15.577.54. It executed no release. Since said receipt there has been no change in the position of the defendant. Its rights against Thompson and his co-executor are unimpaired. At the time the notice was given the money of Mr. Holly was still in its possession. Nothing whatever to change its relation towards the executors was done between the time of the receipt of the money and of the notice. The Missionary Society had in no way assumed any new obligation or made any change in its affairs predicated upon the possession of this money. The proof shows that the business of the society, which is not a commercial one, was entirely unchanged as to its course and method. Holly's money, therefore, was simply and only an increase in the bank balance of the said society.

Second. Can a legatee whose legacy is payable out of funds of the estate, after the loss of those funds, retain the moneys of a third person fraudulently misappropriated?

Thompson had actually embezzled the funds of the Saul estate. There was no money or property in the hands of the executors. The award of such property was a nullity. The executors could have been made responsible because of the embezzlement, but there was no decree to that effect. Instead of shares of stock, cash was received by the Missionary Society which did not belong to it, but to Holly. The society did not release the executors from liability. If it had given a release, the same would have been important. It took the property of another, not that awarded to it, and it retained all its rights against those who made a wrongful payment. The legacy from the Saul estate was payable only out of the funds of the estate, and, as has been shown, these funds were non-existent. It was the respondent's gross

neglect that prevented it from making the discovery that Thompson had embezzled its funds.

This was not an ordinary commercial transaction. The attempted payment of a legacy three years overdue by a check not drawn by the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check, he receiving his paid note from the holder.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to commercial paper alone. It is a hard rule, and should only be applied where commercial interests are at stake.

If the decree of the circuit court of appeals is allowed to stand as the law governing cases like this, it will not be difficult for a trustee disposed to be dishonest to easily divert the funds of his *cestui que trust* in order to satisfy the claims of his creditors.

The questions arising in this case, particularly that of the relation of the legatee to the estate from which the legacy is derived, have never been formally decided by this court and are of great importance to every citizen of this country.

9. The opinion of the circuit court of appeals was rendered on the 1st day of March, A. D. 1899, and remanded the cause to the court below, with instructions to dismiss the bill with costs. The decree of the said circuit court of appeals was duly entered, and its mandate has been issued.

10. And your petitioner further represents that said decree of said circuit court of appeals is final between the parties unless this honorable court of its own motion should direct the bringing for review the said cause.

Wherefore petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this hon-

orable court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this honorable court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled James Holly, complainant and appellee, against The Domestic and Foreign Missionary Society and E. Walter Roberts, defendants, appellants, in equity, to the end that the case may be reviewed and determined by this honorable court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this honorable court.

Your petitioner will ever pray, &c.

JAMES HOLLY,
By MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
His Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted this day of , A. D. 1899.

Defendants.

Exhibit A.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK. IN EQUITY.

James Holly

vs.

Domestic and Foreign Missionary Society.

Henry C. Thompson was a lawyer and real-estate agent in Philadelphia, and was an executor of the estate of James Saul, of Philadelphia, and had in his hands, as such, about $15,000, devised and decreed to the defendant, of New York. The plaintiff gave him a check for $12,000 and a receipt for $200, advanced to pay for a house which the plaintiff had bargained for. He immediately deposited the check in another bank, where he had about $4,000 more; gave his check on that bank to the defendant for $15,577.54, and took a receipt as "from executors estate James Saul" for that amount, without further specification. When the plaintiff learned where his money had gone to, he demanded it of the defendant and brought this suit to reach it.

Principles adequate for the decision of this case are found, as understood, in Brown *vs.* Smith, 3 How., 763, and National Bank *vs.* Insurance Co., 104 U. S., 54. In the former case the defendant had collected a draft belonging to the plaintiff, received from a person who had received it from the plaintiff, and credited the proceeds to the person from whom the defendant received it on an account before due, without any knowledge that it belonged to the plaintiff, or did not belong to him. The plaintiff there was held to be entitled to recover at law, because the money belonged to him, and no new transaction had arisen between the defendant and the one from whom he received it, but the crediting of it on the previous debt. The defendant here is in the same situation in respect to this money, except that the

money was delivered in breach of trust, which is no betterment. In the latter, after a thorough examination of the cases, money is said to be recoverable by the true owner so long as it is traceable and its possession, with liability of its recovery, has wrought no disadvantage.

Thompson had, with the plaintiff's check of $12,000, an apparent credit in the Union Trust Co. of $17,158.60, and drew one check of $42 and another of $50 on the same day that he drew the check for the defendant, but whether either or both before or after that one does not appear; but if after, he had an apparent credit not drawn against of $17,066.60, which would leave $1,489.06 after that check of $15,577.54 was drawn, and which might as well be a part of the plaintiff's as of any other money, and that amount of other money as well drawn against as the plaintiff's; but, if all was so, the check must have been drawn against at least $10,326.94 of the plaintiff's money. Afterwards but $104.35 was deposited, and a check of $507.58 was drawn, and, with these two checks of $42 and $50, paid before the check to defendant was paid, and after that was paid a balance of $885.35 was left to the credit of Thompson. These checks may as well have been paid from, and this balance as well left of, the plaintiff's, as any other money, and, so reckoning them all, there still remains $10,028.82 of the money that went to the defendant which came directly from, and belonged to, the plaintiff. This tracing accords to the defendant full advantage of the fact that neither money itself nor bank credit for money has any ear-marks, and puts upon the plaintiff the burden of showing what of his money must actually have come into the hands of the defendant, by allowing for all that from want of ear-marks or confusion of credits may have in any manner gone elsewhere.

In National Bank *vs.* Insurance Co., 104 U. S., s. 54, Mr. Justice Matthews said, at page 69, in giving a reason for a dissent of Sir George Jessel, Master of the Rolls, from Lord

Ellenborough, "for equity will follow the money, even if put into a bag or undistinguishable mass by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule."

The plaintiff, before learning where his money had gone to, undertook by legal proceedings to collect it of Thompson. This is claimed to be such an election of rights or remedies as to prevent recovery of the defendant afterwards. The defendant does not appear to have been induced by that to do or leave undone anything otherwise than was done, or to have been in any way affected by that course which, if it had been successful, would have been advantageous to the defendant. In National Bank *vs.* City Bank, 103 U. S., 668, the plaintiff sought to recover for negligently delivering wheat to an elevator belonging to A. F. Smith & Co., drawers of drafts secured by bills of lading, which was followed and partly recovered after it had been drawn out of the elevator and forwarded to others. As to this Mr. Justice Miller, in delivering the opinion of the court, said:

"Some question is made in the argument as to the effect of proceedings taken by plaintiff to recover the wheat or its value of parties who bought or received it from A. F. Smith & Co. It is only necessary to say, if the jury shall be of opinion that defendant was negligent in delivering the wheat to A. F. Smith & Co. it is responsible to plaintiff for the amount of the unpaid drafts less any sum not actually recovered from others."

Here the plaintiff recovered nothing of Thompson, and there is nothing to be deducted. Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond reach and cannot be recovered; but the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in

furtherance of its objects, nor that any of this particular money was applied to any of its purpose.

As the defendant retained the money after notice that it was the plaintiff's and claimed by him, interest upon it follows from that time.

Decree for plaintiff for $10,028.82, with interest.

(Signed) HOYT H. WHEELER.

EXHIBIT B.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

JAMES HOLLY, *Appellee*,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA ET AL., *Appellants*.

WALLACE, *Circuit Judge*:

This is a suit brought to recover certain moneys received by the defendant, The Domestic and Foreign Missionary Society, etc., through the check of one Thompson, upon the theory that the check was paid by the misappropriation of a trust fund in Thompson's hands belonging to the complainant. The facts are these: The complainant employed Thompson as an attorney and conveyancer about the purchase of certain real estate, and June 19, 1890, delivered to him a check for $12,000, with instructions to apply the proceeds to the payment of the purchase-money. Instead of doing so, Thompson used the check as a credit item in his account with the Union Trust Company, and misappropriated the proceeds by checks drawn by him on the trust company. Among these checks was one dated June 20, 1890, for $15,577, payable to the order of the Missionary

Society. Thompson was one of the executors of the estate of James Saul, under whose will the Missionary Society was a legatee. A decree of the probate court having jurisdiction in the premises had been entered in November, 1889, settling the accounts of the executors and ordering payment of the legacy. Thompson's co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the Missionary Society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the Missionary Society in substance that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson, stating that he was going to New York to settle with the Missionary Society. The next day Thompson called at the office of the Missionary Society and delivered to its treasurer the check for $15,577, the amount being the sum due as principal and interest upon the legacy. The Missionary Society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below, this check was, to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the Missionary Society for that amount in favor of the complainant.

The proofs do not disclose any fact or circumstance tending to show that the Missionary Society supposed when it received Thompson's check that the check was not drawn against his own funds. The circumstance that the payment was made by his individual check, and not by that of the executors, was suggestive of irregularities in his conduct as an

executor, but it does not seem to have created any suspicion of his integrity, and was not calculated to do so. There was no impropriety in his paying a debt of the estate with his own funds, if he saw fit to do so. The Missionary Society undoubtedly received it in entire good faith. Upon these facts we are constrained to conclude that the complainant was not entitled to a decree.

The familiar doctrine that the beneficial owner of trust property which has been misappropriated by his trustee is entitled to follow it in a court of equity, through any transmutations in which it can be traced, and reclaim it in its new form, not only as against the trustees, but also against any other person who has no better equitable title, applies to money which has been entrusted by a principal to his agent for a specific use, and which the latter has diverted. In the case of a principal or of any person who has a legal title, the money is recoverable at law by an action for money had and received (United States *vs.* State Bank, 96 U. S., 35), and the interposition of equity is unnecessary. The old notion that money cannot be thus followed because it has no ear-marks has been exploded; though in many cases, where it has been mingled with other moneys of the wrongdoer or been converted into other property, the practical difficulty of identifying and following it is insuperable. Knatchbull *vs.* Hallett (13 Ch. Div., 696), McLarren *vs.* Brewer (51 Maine, 402), Brosniham *vs.* Sheehan (125 Mass., 11), Van Allen *vs.* American National Bank (52 N. Y., 1), National Bank *vs.* Insurance Co. (104 U. S., 54). Upon this doctrine undoubtedly the complainant was equitably entitled to follow his money into the hands of the Union Trust Company and reclaim it until it had been withdrawn by Thompson's check upon that company, and to follow it again through Thompson's hands into the possession of any other person receiving it as a volunteer or with notice of complainant's rights, and reclaim so much of it as could be traced into the check. But the Missionary Society was not a

volunteer. It received the money innocently in discharge of a debt, and good conscience did not require it to restore the money to the complainant on subsequent information of his rights. Neither in equity nor at law, in an action for money had and received, can he whose trust moneys have been perverted, prevail against the title of one who has acquired them *bona fide* and for value. He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently or acquires the commercial paper before its maturity, and without notice of any infirmity, has a perfect title, which cannot be subordinated to the equities of any third person.

In the action for money had and received, which is controlled by principles of equity, and in which the general rule is that the plaintiff is entitled to recover money *ex æquo et bono* the defendant ought to refund, there are many illustrations of the doctrine that a defendant who had received money innocently in payment of a debt is under no obligations to restore it, notwithstanding, as between the plaintiff and the person from whom the defendant received it, it ought to be regarded as the money of the plaintiff. In Merchants' Insurance Co. *vs.* Abbott (131 Mass., 397) the plaintiff, an insurance company, paid a loss upon the order of one Abbott, the assured, to persons to whom the latter was indebted, and, upon discovering that the loss was fraudulent, brought the action against them to recover back the amount. The court held that the action would not lie, Gray, C. J., saying:

"These defendants hold no money which *ex æquo et bono* they are bound to return, either to Abbott or to the plaintiffs."

In Miller *vs.* Race (4 Burr, 452) Lord Mansfield said:

"Money shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business."

In Mason *vs.* Wait (17 Mass., 563) the court said:

"It would be mischievous to require of persons who receive money in the way of business or in the payment of debts, to look into the authority of him from whom they received it."

In Lime Rock Bank *vs.* Plimpton (34 Mass., 159) it was held that money of a principal misappropriated and lent by his agent to a creditor, the agent being indebted to the creditor in a larger sum and the creditor receiving the money *bona fide*, could not be reclaimed by the principal, as in a suit by the principal the creditor could set off the agent's debt. The court said that in respect to money the owner could not follow it, "not only because money has no earmarks, but because a different doctrine would be productive of great mischief." In Justh *vs.* National Bank of the Commonwealth (56 N. Y., 483) the court stated "that if money which had been received in the regular course of business can be followed, the transaction of business must be stopped, for no security and no precaution can guard the receiver from responsibility." In Stevens *vs.* The Board of Education (79 N. Y., 187) the court used the following language:

"It would introduce great confusion into commercial dealings if the creditor who receives money in the payment of a debt is subjected to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration, if the consideration is good as to all the world."

Ever since the case of Smith *vs.* Tyson (16 Peters, 1) it has been the law of the Federal courts that the transferee of commercial paper, who receives it in payment or as security

for an antecedent debt, is a holder for value. Railroad Co. *vs.* National Bank (102 U. S., 14); McMurray *vs.* Moran (134 U. S., 150). It is immaterial, therefore, whether the check received by the Missionary Society is treated as money or as commercial paper; in either form, as it was taken *bona fide* and in payment of a debt, no part of the amount can be reclaimed by the complainant.

The following adjudication may be cited in support of the general proposition: State Bank *vs.* United States (114 U. S., 401) was a case in which, by the connivance of a clerk of the office of an assistant treasurer of the United States, one carrier unlawfully obtained from that office money belonging to the United States, and to replace it delivered to the clerk money which he obtained by fraud from the plaintiff, the clerk having no knowledge of the fraud. The court held that the United States was not liable to refund the money. In Goshen National Bank *vs.* State of New York (141 N. Y., 379) the defendant, in payment of moneys due from a county treasurer, received a draft wrongfully and fraudulently drawn by him as cashier of the plaintiff upon another bank, the plaintiff's correspondent. In an action to recover the amount of the draft which the plaintiff had been compelled to pay to its correspondent, the court held, that as the defendant had received the draft in good faith the plaintiff could not recover. The court said:

"The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid instead of an order given for its payment."

Hatch *vs.* National Bank (147 N. Y., 184) was a case in which a bank in good faith, in the ordinary course of business and without notice, had received from a customer checks of third parties, obtained by his unlawful pledge of the securities of the plaintiff, and the bank, pursuant to a continuing agreement with the customer to that effect, ap-

plied the checks in payment of an existing indebtedness against him. The court held that the bank was not liable to refund the money due to the owner of the securities. The court said:

"If, therefore, Smith had come with the money and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actually the proceeds of the stolen certificate."

And added by Finch, J.:

"I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected."

The case of Swift *vs.* Williams (68 Md., 236) is cited by the appellee as an adjudication in his favor and as sanctioning the proposition that the equitable owner of misappropriated trust funds can follow them into the hands of a creditor who has taken them innocently in payment of a debt. We have been unable to find any other adjudication to this effect, and we regard the decision as a departure from principle and authority.

The decree is reversed, with costs and with directions to the court below to dismiss the bill.

1631

No. xxxq. 138

Br. of Brainerd & Johnson for Pet

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Sept. 28, 1899.

Office Supreme Court U. S.
FILED
SEP 28 1899
JAMES H. McKENNEY,
Clerk

No. 409.

JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Brief in Support of Motion for Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
Attorneys and Counsel for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-28-'99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

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JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

The principal contention of the defendants in this case in the court below was that Thompson was indebted to the defendant Missionary Society in an amount greater than the sum of $15,577.54, and that the check for that amount was given to the society in payment of that debt; that this sum was received by defendant in good faith and without notice of any equity or claim on the part of the complainant.

It cannot be disputed that Thompson obtained from the complainant Holly the sum of $12,000 as a trust fund. The check was given by Holly to Thompson as attorney (R., pp. 50 and 94). The receipt which was given for the said $12,000 expressly stated that the said amount was "to be

applied to purchase of house No. 643 N. 15th St." This was an express acknowledgment and declaration on the part of Thompson that the money which was obtained from Holly was a trust fund for the purpose mentioned. By Holly's check to Thompson's order as attorney Thompson was appointed trustee for the fund. This was all that was necessary to perfect the trust as completely as could possibly be done in the creation of an express trust.

"Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, person and purposes of the trust."
1 Perry on Trusts, sec. 124.

Neither can it be disputed that the trust fund was wrongfully, fraudulently, and feloniously obtained and misapplied. The intent and purpose with which it was obtained is shown by the fact that his (Thompson's) co-executor, after numerous demands had been made upon Thompson, called upon him on the evening of the 18th and demanded to see the securities in which Thompson had all along declared Saul's estate was invested, and of which the co executor had notified the society, particularly by the letter addressed to Dr. Langford under date of May 29, 1890 (Exhibit M, defendant's supplemental answer, R., p. 43, fols. 166–168), in which it was stated, "For your information I will say, most of the legacy is in bonds, so that it is accumulating interest to the credit of the legatee," and Thompson agreed to produce them the next day at one o'clock, when his co-executor was to call and examine them (R., p. 83, fols. 146, 147). After thus promising what he knew he could not perform, and being without other available means to secure the amount required to be paid by the Saul estate, he took advantage of Mr. Holly's calling the next morning to inquire about his business, to induce Holly, by falsely stating that the papers were ready, to deposit the $12,000 in his (Thompson's) hands for the purchase of the property.

Thompson's immediately taking that money and depositing it in his individual account, and drawing upon it, with what amount he had in bank, a check for $15,577.54 in favor of the defendants, and handing that check over to the defendants, is conclusive of the intent with which Thompson obtained Holly's money. The whole transaction was a continuous one, so far as Thompson was concerned, beginning with his falsely inducing his client Holly to hand him the check, under the pressure of the disclosure of his wrongdoings in Saul's estate, which would inevitably follow if he had not taken this course.

It is submitted that Holly never parted with his ownership of the money. Thompson therefore could not make title to another for property of which he was not the owner.

"If a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the court will disentangle the accounts and give the *cestui que trust* what belongs to them. And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice; but the bill must specify the property which it identifies with the trust fund."

2 Perry on Trusts, secs. 837 and 838.

"The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change."

2 Story Eq. Jur., sec. 1258.

"Equity impresses a constructive trust upon this species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosesoever hands it may come, except unto those of a

bona fide purchaser for value, without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded."

2 Pomeroy's Eq. Jur., p. 1562, ed. of 1892, sec. 1051.

"And the better opinion on authority now is that even as to creditors the mixing of trust funds with private in a general deposit does not obliterate the trust."

2 Perry on Trusts, sec. 828.

"And it may be added that an abuse of trust can deprive the *cestui que trust* of no rights, so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of all the equities."

2 Perry on Trusts, sec. 835.

Upon the delivery of the check by Thompson to the defendant, the defendant gave a receipt therefor, of which the following is a copy:

"NEW YORK, June 19, 1890.

"Received from executors estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

"$15,577.54.

"GEORGE BLISS, Treasurer,
"Per E. WALTER ROBERTS,
"Ass't Treasurer."

Two questions are presented by the record:

First. Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner where he does nothing more than give a naked receipt therefor?

In this connection it should be specially noted that the Missionary Society made no change in its affairs by reason of the receipt of the money from Thompson. It did not

pay out the money. It always, till weeks after its receipt, had a bank balance greatly in excess of the amount of Thompson's check; nor did it in any way increase its expenses or incur new obligations. Its business proceeded as it had theretofore done. The society simply had an increased balance to its credit.

Second. Can a legatee whose legacy is payable out of funds of the estate, after the loss of those funds, retain the moneys of a third person fraudulently misappropriated?

In the case of Pennell *vs.* Deffell, 4 De G. M. & G., 372 and 388, Lord Justice Turner says:

"It is, I apprehend, an undoubted principle of this court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the proofs of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Vice-Chancellor Sir W. Page Wood, in Frith *vs.* Cartland, 2 Hem. & M., 417 and 420, said that Pennell and Deffell rested upon and illustrated two established doctrines. One was that "so long as the trust property can be traced and followed in other property, into which it has been converted, that remains subject to the trust." The second is "that if a man mixes a trust fund with his own, the whole will be treated as the trust property, except so far as he is able to distinguish what is his own."

The whole subject was very elaborately reviewed by the court of appeals in England in the very recent case of Knatchbull *vs.* Hallett, *In re* Hallett's Estate, 13 L. R., Ch. D., 696.

It was there decided that if money held by a person in a

fiduciary character has been paid by him to his account at his bankers', the person for whom he held the money can follow it.

The Master of the Rolls, Sir Geo. Jessel, in Clayton's case, 1 Mer., 572, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary relation is that whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify it.

This principle has been frequently recognized by this court.

In Wilson & Co. *vs.* Smith, 3 How., 763, it is held:

"Whenever by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction, the principal may treat this sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received. If in such case the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor."

In Oliver *vs.* Piatt, 3 How., 333, it is held: In case of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice. Where a trustee has in violation of his trust invested the trust property or its proceeds in any other property, the *cestui que trust* has his option either to hold the substituted property liable to the original trust or to hold the trustee himself personally liable for the breach of the trust. The option is for benefit of *cestui que trust* alone, not for the benefit of the trustee.

An agent employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterward become possessed of the trust property, bound by the trust in the same manner as the trustee. Where upon the face of the title papers the purchaser has full means of acquiring full knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof.

In U. S. *vs.* State Bank, 96 U. S., 30, it is held: Where a trust fund has been perverted, the *cestui que trust* can follow it at law as far as it can be traced.

The United States cannot, against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent.

The rules of law applicable to an individual in a like case apply also to the United States.

The same doctrine is announced in the following cases:

National Bank *vs.* Ins. Co., 104 U. S., 54.
May *vs.* Le Claire, 11 Wall., 217.
Bayne *vs.* U. S., 93 U. S., 642.
Manhattan Bank *vs.* Walker, 130 U. S., 267.
Jones *vs.* Van Doren, 130 U. S., 684, 691.
Peters *vs.* Bain, 133 U. S., 670, 694.

In Van Allen *vs.* Bank, 52 N. Y., 1, it is held: Where an agent deposits in a bank to his own account the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the time deposits other moneys belonging to himself, nor is it affected by the fact that the agent substitutes other money in depositing. In such cases, in an action by the principal against the bank upon its refusal to pay upon presentation of agent's check for the amount

so deposited, the bank cannot set up a want of privity. It is a question of title solely.

Farmers' and Mechanics' National Bank *vs.* King, 57 Pa. St., 202.

In Swift *vs.* Williams, 68 Md. Rep., 236, decided in the Maryland court of appeals, W and V were trustees for the sale of certain real estate. W, being about to go abroad, obtained an order from the court authorizing V to receive the purchase-money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V a check for the purchase-money, payable to the order of W and V, trustees. V indorsed this check with his own name only as trustee to the Manufacturers' national bank for deposit, giving the bank a copy of the court order, and opened account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check, on reaching the Manufacturers' bank through the clearing-house, was charged to the said account of V as sole trustee.

The bank on which the check was drawn which was given to V, and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because indorsed by V alone. V thereupon arranged with the Manufacturers' bank to alter the indorsement by signing W's name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchaser's check was drawn refused, however, to honor it on such new indorsement, and the purchaser obtained a cashier's check from said bank for the same amount and deposited it in the Manufacturers' bank to the joint credit

of W and V, trustees, and took up his own check; thereupon V added the name of W, trustee, per V, trustee, to the check he had theretofore drawn on the Manufacturers' bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V, the Manufacturers' Bank, and Swift, to whom the amount checked out by V was paid, to compel the replacement of the trust money which was misappropriated through the check given by V to S in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted; and, further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per IRVING, *J.*:

"Swift cannot be regarded as a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor who is paid from wrong funds a purchaser without notice (2 Pomeroy, Eq., 622, and authorities cited)."

Swift *vs.* Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (edition of 1892), section 747, note, page 1044, as an authority for the statement in the text that—

"No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a bona fide purchaser."

The defendants further contended that, as executors of the will of James Saul, deceased, having filed their account in the orphans' court of Philadelphia county, showing a balance due to the defendant Missionary Society of $14,927.54, which account was confirmed absolutely November 23, 1889, thereby became jointly and severally liable to the defendant Missionary Society for the entire amount (Defendants' Exhibit J, R., p. 249, fol. 325, and Exhibit O, R., p. 44, fol. 170); and, being thus indebted, defendants' counsel contend that the giving of the check constituted the Missionary Society a holder for value of Holly's money.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to negotiable commercial paper alone. It has no application to the transfer of negotiable paper which has matured, or to the payment of a check which is payable on demand.

Moore *vs.* Ryder, 65 N. Y., 438.

The defendants cannot claim to be *bona fide* purchasers for value without notice in this case, because they were actually informed of facts and circumstances and had oft-repeated warnings which put them upon inquiry which, if made and followed up, would have led them directly to full knowledge of the embezzlement of the whole of Saul's estate and of Thompson's insolvency long before they obtained Holly's money. With this knowledge of his insolvency, defendants should not have accepted Thompson's individual check as a payment on account of the legacy. The pretense that this was an ordinary commercial transaction is absurd. It has no single feature according with such dealings. The attempted payment of a legacy three years past due with a check,

not drawn by the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check and receiving that paid note from the holder.

With notice of Thompson's embezzlement, the respondents accepted his individual check for $15,577.54 instead of demanding from him the securities in which they had been informed that the estate was invested. At the same time Thompson handed them the following memorandum, which was in his handwriting :

Estate James Saul :

Balance as per account filed.....	$14,927 54
Dividends received since, not included in account.....	650 00
	$15,577 54

But in accepting his individual check they knew that they could only rightfully claim payment of it out of what individual moneys he might then have in the bank to his credit. They could not thereby acquire any property or right to trust funds that Thompson might have obtained from other parties and deposited with his own moneys in his individual account upon which the check was drawn.

"A check is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer."

Grant on Banking, 85.

Keene *vs.* Bread, 8 C. B. N. S., 373.

It is contended by the respondents that they became *bona fide* holders for a valuable consideration of this fund by virtue of their having received it on account of this legacy, but the fact is they did nothing but simply receive the money. They parted with nothing whatever at the time. They did not release Thompson or his co-executor; they simply gave him a receipt, as " from executors' estate James

Saul," for so many dollars in money (fols. 130–132). It did not state what it was on account of, whether it was a legacy or a debt *due* the society.

Under these circumstances the respondents can plead neither innocence nor consideration.

"Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by canceling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong. The doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority."

2 Pomeroy's Eq., ed. of 1892, sec. 918, pp. 1302–3, citing Ogilvie *vs.* Jeaffreson, 2d Gifford, 353.
Swan *vs.* N. British, &c., Co., 7 Hurlst & N., 603.
Taylor *vs.* Railway Co., 4 De Gex & Jones, 559.
Donaldson *vs.* Gillot, L. R., 3 Equity, 274.
Barnard *vs.* Campbell, 58 N. Y., 73; S. C., 55 N. Y., 456.

Defendants further contended that the Missionary Society had expended the proceeds of Thompson's check before they had knowledge of Holly's claim.

This is not in accord with the facts as proved. The bank account of defendant with the National Bank of New York (R., pp. 153–171) shows that on June 20, 1890, there was a balance to the credit of the defendants in that bank of $43,569.83; that on that day there was a deposit of $16,540.26. The deposit ticket for this amount was produced and showed that Thompson's check for $15,577.54 was included in that

deposit. The total amount of the balance in bank, including that day's deposit, was $60,110.09. Between June 20, 1890, and July 18, 1890, inclusive, when notice was received by the defendants that the money belonged to Holly, the defendants had received and deposited additional sums of money, amounting to $45,265.81, making a total of deposits from June 20 up to July 18, 1890, of $105,375.90. Against this the society had drawn checks for $74,663.96, leaving a balance of moneys belonging to defendants of $30,711.93 on deposit, July 19, 1890, the day after they received the notice that it was Holly's money, or $18,711.93 of their own money, exclusive of the $12,000 of Holly's money. During all this interval of time there was not a single day in which there was not a balance of money belonging to the society on deposit in the National Bank of New York largely in excess of the amount which belonged to Holly, and, therefore, the money belonging to Holly and not to the society, was not touched by check or draft during all that time. The defendants can only be presumed to have drawn upon their own funds and not upon any of which they obtained possession or control through the fraud of Thompson as their executor and trustee of the moneys belonging to the Saul estate. They could not profit by the fraud of their agent in paying them the money which their agent knew at the time belonged to other parties. (See R., p. 195, fol. 592 to 595.)

U. S. *vs.* State Bank, 96 U. S., 30.

Defendants further claim to be holders for valuable consideration upon the idea that having received the money as legatees under the will of Dr. Saul, and their assistant treasurer having clerically gone through the form of dividing the amount by three, that thereupon the moneys received from Henry C. Thompson, executor, as alleged in the fifth section of the supplemental answer (fols. 129, 130), were expended for domestic missions, foreign missions, and

for the benefit of the colored people in the Southern or formerly slave States for the support of schools and missions, and the application is declared to have been made under a resolution of the board passed on the 10th day of June, 1890 (fols. 172, 130); this application could not affect moneys which belonged to another, but only such as rightfully went into the treasury of the society for the purpose. As late as August 4, 1890, after all their previous checks had been received and paid by the bank, they still had in bank the sum of $18,610, and at no time prior thereto did they have a less sum on deposit to their credit.

The rule of legal accounting requiring that the first debit shall be charged against the first credit in an account, has no application to this case. Under no circumstances could it apply to funds fraudulently obtained and deposited to the credit of the society, when the defendants had their own funds that could properly be drawn upon at the same time to meet their expenses. Deposits were made from time to time as the business of the society was ordinarily conducted, and their checks were drawn upon their deposits in the usual course, and therefore could not affect a fund which had been fraudulently transferred to their deposit account, but only their own funds, so long as those funds should be sufficient for the purposes of their business. If they had exhausted their own funds on any day between the 19th of June and the 18th of July, and had to take from Holly's money to make up the payments of the day, there might be some ground for the contention, but there was not a single day within that period when their own funds were exhausted, and, consequently, Holly's money lay in the bank wholly unaffected by their drafts upon funds which rightfully belonged to them.

The defendants further contended that there was no competent evidence to show that any money of the complainant ever came into the hands of the defendant Missionary So-

ciety; that the books of Thompson as produced and offered in evidence were, as regards the defendants, the merest hearsay, and therefore incompetent and inadmissible. To these points it is replied:

First. That Henry C. Thompson was executor and trustee for, and as such the representative of, the defendants at the time these entries were made in his books, and they were, therefore, the principal's entries as much as they were those of its representative in the trust.

They were not the private entries of third persons, but they were the entries of an agent or trustee in regard to the trust fund, showing his transactions relating to that fund, by which, as against third parties, the principal as well as the representative is bound. In this case the defendants allege that they had received this money in payment of a legacy of the Saul estate. What was the answer to this? Their trustee's own account showed that the money which Thompson had received on their account had long since been appropriated to his own use. How was this "hearsay," or how was this evidence incompetent, it being the evidence from his books of charges against his interest as that of their own trustee?

The relation of Thompson and his co-executor as their trustee was the same after the adjudication had been made of the executors' account as it was before the adjudication. The adjudication was an award of the residuary estate to the defendants, in money or in kind, in the condition that it was then supposed to be. Thompson was still occupying the position of trustee for these defendants at the time he took Holly's money, and was acting as such trustee when he made payment to his *cestui que trust;* he was not acting in the ordinary capacity of a debtor to the society. The only effect of the adjudication was to charge the executors as trustees with the balance of the estate then in their hands as fixed by the inventory and appraisement with which they stood charged in their account as adjudicated.

"He [the executor] is considered as a trustee holding a resulting trusteeship for those entitled, either as residuary legatees or next of kin. At no one time in this State was it [the appointment to an executorship] an extinguishment of the debt [due by an executor to the decedent], for the executor has always been held as a trustee." Wilson *vs.* Wilson, 3 Binney, 557; per Sterrett, J., in Pringle *vs.* Pringle, 130 Pa. St., 565, 569.

Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act while it is in progress is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations explanatory of these acts are admissible; nor in proving such declarations is it necessary that he should be himself called.

2 Wharton's Evidence, sec. 1173.

The entries in the bank book of Thompson and in his diary and the deposit ticket were, with the original checks, the immediate accompaniments of the fraudulent acts of Thompson and admissible as part of the *res gestæ*.

"Coincident business declarations are hence to be received to qualify the acts to which they relate."

1 Wharton's Evidence, sec. 262.

See also 1 Greenleaf's Ev., sec. 115.

Second. It is not necessary to go over all the evidence as to whether or not the defendants had in their bank at the time of the notice, this money of Holly. Complainant's Exhibit No. 9, R., pages 136 and 195, taken in connection with Mr. Burton's testimony (R., pp. 136 and 137, fols. 356–363), put this beyond question. From the day they deposited Thompson's money in the Bank of New York down at least to August 5, the current charges of the defendant were paid out of honest money, and the stolen fund re-

mained in that bank to the credit, in judgment of law, of Holly, the man from whom Thompson had taken it.

Defendants say that Holly opened a debtor and credit account with Thompson. If this be so, then the fiduciary relation of attorney and client has disappeared; but when a client delivers a bag of money to his lawyer, and takes from him a receipt which declares, in accordance with the fact, that the money is to be applied to the payment of the client's purchase price of a specific lot of land, that attorney becomes something more than a mere debtor. The suggestion that money has no "earmarks" would be good if it were not that courts of equity have for years been engaged in tracing stolen money and making decrees restoring it to the legitimate owners.

In re Irish-Am. Bk., 73 N. W. R., 6.

The defendants further contended the plaintiff had previously commenced an attachment proceeding, and was thereby estopped from maintaining this suit against the defendant.

The facts in this record are as follows: The plaintiff Holly was in ignorance as to the true state of his business with Thompson until the 15th day of July, 1890 (Q. 21, R., p. 50). He applied to his Philadelphia counsel, Mr. Burton, the same evening (Q. 6, R., p. 129). On the next morning the investigation was commenced, and, on the partial information then obtained, the affidavit was prepared which was made and filed (R., p. 175, fols. 512–523) on the 17th day of July (fol. 536), when the attachment as it bears date was issued and served (fols. 538–540).

Prior to the issuing of the attachment Mr. Burton had been unable to ascertain the history of the transaction. He was told by the bank that no information could be given him "unless it was in response to legal proceedings that had been taken" (R., p. 130, fol. 133). The desired information could not be obtained until after counsel for Mr.

Holly had instituted attachment proceedings and had served it upon the bank which had collected Thompson's check for the society in New York. Then, in response to Mr. Burton's inquiry (R., p. 130, fol. 335), he ascertained the course which the fund of his client had taken, and that the check was drawn to the order of the society respondent (R., p. 130, fol. 335). Mr. Burton immediately addressed a letter to the defendants (see defendants' answer, R., pp. 20 and 21, fols. 80–83), enclosing copy of plaintiff's affidavit in the attachment suit.

Now, what happened after that? Nothing whatever was done in the attachment proceeding. On the same day Thompson had previously made an assignment for the benefit of creditors to his son, which was recorded at 12.39 p. m. at Philadelphia (R., pp. 58 and 59 and 188, fols. 48 and 566), about two hours before the attachment was served on Thompson's assignee.

At the time of the assignment Thompson was indebted in something like the sum of one hundred thousand dollars, and the total of the assigned estate, as stated by his assignee, was about twenty-five hundred dollars (R., p. 97, fols. 203, 205).

Immediately upon discovering the fact that the money had been traced into the defendant's deposit account with the bank of New York, defendants were notified that it was complainant's property, and that he (Holly) claimed the money in their hands as his property and demanded a return to him of the same. This was clearly an election on his part at that time to claim the funds in the defendant's hands, and no action since then has been taken by Holly inconsistent with that claim.

The proceedings were allowed to remain in suspense, however, until it became necessary, by the action of Thompson's assignee for the benefit of creditors, in moving, on January 26, 1894, to dissolve the attachment, to make some disposition of that case on the ground set up in his petition

that Holly had refused to present any claim or submit any proof of claim (R., p. 189, fols. 569–571). This motion was pending when the plaintiff applied to this court for leave to continue the proceeding, in order that whatever moneys might be obtained from Thompson's assigned estate should be applied to the relief of whoever would eventually be the losing party in this suit—this to be without prejudice to the rights of either party in this proceeding; but it was objected to and resisted by the respondents' counsel on the ground that the complainant had already elected his remedy under the attachment proceeding, and had no right to recover the money in the present proceedings. The court refused the application, having no precedent for granting such leave where the opposite party either rightfully or wrongfully objected.

Up to the time when this application was made the respondents had not suggested in their answer or supplemental answer to the bill any defense grounded upon the alleged election of an inconsistent remedy by Holly in the issuing of the attachment process above referred to, and, in so far as this record is concerned, the defendants did not at that time or subsequently thereto make this defense to the present action.

In equity, it is the rule that no defense can be set up against a bill filed in the case unless that defense is specially made in the plea and answer to the bill as filed. In this case, to any argument that may be presented for the purpose of showing that the plaintiff had elected his remedy and was estopped thereby from pursuing this suit, we answer that no such defense was set up, and therefore no such defense can be available as a defense at this time.

"When a defendant makes his defense by answer he must set up all the various grounds of defense upon which he intends to rely."

Warren *vs.* Warren, 30 Vt., 530.

But inasmuch as this point, as to complainant's having elected his remedy, was raised by the respondents in opposition to the motion for leave to prosecute, on the 14th day of April, 1894, the complainant Holly, with leave of the court where the suit was pending, paid the costs of the attachment in Philadelphia and discontinued the same (R., p. 173, fol. 507; Complainant's Exhibit No. 8, R., p. 173). The entry of discontinuance, as it appears on the exhibit, is in the form in which discontinuances are entered according to the practice of the courts in the State of Pennsylvania (R., p. 135, D. 20, fol. 355).

By discontinuing the attachment proceedings the complainant reiterated his election to rely solely upon his right to recover from the respondents his property, the title to which he never had parted with, but has always insisted upon up to this date.

The doctrine of a conclusive election of one of several remedies by personal action rests on an equitable estoppel, but at any time previous to an adjudication he may discontinue the first action and proceed with the second.

Johnson *vs.* Frew, 33 Hun. (N. Y.), 193.

"A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found."

Powers *vs.* Benedict, 88 N. Y., 605.

"An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof."

See opinion by Smith, J., in Equitable Co-operative Foundry Co. *vs.* Hersee, 33 Hun., 169.

In Loeb *vs.* Willis, 100 N. Y., 231, 235, it is said:

"If a suit be discontinued at any stage, it is not an estoppel or bar in any sense. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."

Citing Bigelow on Estoppel, 21.

In Webb *vs.* Buckalew, 82 N. Y., 555, it is said:

"Where the litigation has ended in a discontinuance, so that an actual decision on the merits has not been reached, the proceedings have no conclusive character and cannot operate as a bar."

Citing Carlisle *vs.* McCall, 1 Hilt., 399; Audubon *vs.* Excelsior Ins. Co., 27 N. Y., 216.

In Lloyd *vs.* Brewster, 4 Paige Ch., 537, cited by appellants, the second syllabus reads thus:

"If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined."

In Mattlage *vs.* Poole, 15 Hun. (N. Y.), 556, it appears that an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. Held, that so long as no judgment was entered the plaintiff's act in suing both did not constitute an election to hold the principal and discharge the agent.

In Bach *vs.* Tuch, 47 Hun. (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. Held that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow *vs.* Littel, 41 Hun. (N. Y.), 395, A obtained

plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A and obtained an attachment. Then learning that A had transferred the goods to B, plaintiff discontinued and sued B. Held that the action against B was maintainable.

In Hays *vs.* Midas, 39 Hun. (N. Y.), 460, A was induced by B's false and fraudulent representations to sell goods to him. A began suit on contract and attached the goods. Fifteen other attachments preceded A's. A discontinued and began a replevin suit to recover the goods. There was no evidence that when A began his attachment suit he knew of the fraud. Held, that he could maintain his replevin suit.

In Fowler *vs.* Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife, E. The pass book read: "In account with W. for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass book and received the deposit. Held, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. But the court (Earle, J.) said:

"If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property."

See also Nat. Bank *vs.* City Bank, 103 U. S., 668.

The decree of the learned judge of the circuit court for $10,028.82 went upon the ground that so much of Holly's

money was by Thompson's check turned over to defendants. By this finding there was left in Thompson's hands $1,971.18, which was wrongfully paid out by him to other parties, and for which the attachment might properly have been continued, but to avoid all questioning on this point the attachment was discontinued and the costs of suit paid by plaintiff.

In the present case it is difficult to understand how the prosecution of a remedy for the recovery of so many dollars out of Thompson's estate as might have been had under the attachment proceeding, and would necessarily be in relief of the respondents in this proceeding, can be considered as an inconsistent remedy, debarring complainant of his rights in the present action.

It should be borne in mind that the Missionary Society was purely a legatee, and, as such, a mere volunteer. It gave no value whatever for the amount received from Thompson. It did not in any way release its claim upon the executors, and it stands today in the same relation to them as it did before the money was paid. The proofs show that the Missionary Society in no way assumed any new obligation or made any change in its affairs predicated upon the possession of this money. The business of the society, which is not a commercial one, was entirely unchanged as to its course and methods.

The case of Swift *vs.* Tyson and kindred cases, relied upon by the circuit court of appeals, announce a principle applicable solely to commercial transactions, and, it is respectfully submitted, have no bearing upon the facts in this case. All the cases cited by the counsel for the defendants go upon the same ground, and in all of them value was given and important rights released.

If the decree of the circuit court of appeals is allowed to stand as the law governing cases like this, it will not be difficult for a trustee disposed to be dishonest to easily divert the funds of his *cestui que trust* in order to satisfy the claims of his creditors. The questions arising in this case,

particularly that of the relation of a legatee to the estate from which the legacy is derived, have never been formally decided by this court and are of great importance to every citizen of this country.

It is submitted that in the last analysis the opinion of the circuit court of appeals, while conceding that Thompson feloniously diverted this trust fund, amounts simply to this:

1. That the Missionary Society innocently received Thompson's check—that is to say, that the circumstances attending the transaction in this case were insufficient to put the Missionary Society upon inquiry as to the sources from which Thompson derived his money.

2. That it is quite immaterial where Thompson got the money if the Missionary Society received it innocently, as is assumed in the opinion.

3. That it is entirely immaterial whether the money at the time the notice was given remained intact, in judgment of law, in the hands of the Missionary Society.

4. That under the circumstances disclosed in this case the Missionary Society is entitled to hold this money as against its lawful owner, solely and only because it did not have direct evidence that Thompson had acquired it illegally.

5. That the facts (1) that the Missionary Society did not, upon receipt of Thompson's individual check, release the executors of the Saul estate, (2) did not change their relation to their business, or make any new obligations, (3) and did, in judgment of law, have this very money in possession at the time the notice was given, are utterly immaterial to the determination of the questions in this case.

6. It is conceived that the law is and ought to be that under the circumstances disclosed in this case, these three facts are of the utmost materiality, and, being established as they are by the evidence, entitle the petitioner here to a review of the judgment which has been rendered against him, and ultimately to a reversal of that judgment.

It is therefore submitted that the decree of the circuit court of appeals should be reversed, and the decree of the circuit court for the southern district of New York be affirmed.

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CEPHAS BRAINERD,
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Attorneys and Counsel for Petitioner.

No. 409. 138
App. to Br. of Drawer for Pltf.
Filed Oct 16 1899.

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Office Supreme Court
FILED
OCT 16 1899
JAMES H. McKENNEY,
Clerk

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JAMES HOLLY,
Complainant and Appellee,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH OF THE UNITED STATES OF AMERICA and E. WALTER ROBERTS,
Respondents and Appellants.

Brief for Appellee.

(The references in this brief are to the pages and folios in the Printed Transcript of the Record (*i. e.*, Plaintiff's Bill, R., pp. 1 to 11, &c.), except where they are otherwise specially indicated.)

This action was brought to establish against the respondents a trust in favor of the complainant for the amount of $12,000.

The bill was filed on the 16th day of January, 1891 (R., pp. 1–11). The respondents filed their answer on the 30th day of April, 1891 (R., pp. 12–23).

The complainant filed exceptions to the answer (R., pp. 24–29) about the 13th day of June, 1891, and the respondents interposed a further supplemental answer (R., pp. 30–44).

The complainant filed a further replication to the answer and the amended supplemental answer (R., pp.

45, 46) on or about the 23d of January, 1892, and thereafter the proofs were taken.

Statement of the Case.

1. James Holly, a citizen of Philadelphia, employed Henry C. Thompson, who was an attorney at law and a conveyancer, and also the solicitor for the Real Estate Title Company of Philadelphia, to examine the title to a property which Holly had purchased, and on approval of it, to make settlement for the same with the vendor. On June 19, 1890, Thompson, falsely representing that the papers were ready, obtained a check from Holly for $12,000, which he filled up and made payable to his *own* order as attorney, and gave Holly his receipt for the amount to be applied to the "purchase of house No. 643 North Fifteenth street," Philadelphia.

2. More than two years before this, on December 23d, 1887, letters testamentary were granted to said Thomson and Rev. Dr. Watson, as executors of the will of Dr. James Saul, deceased, in which the Domestic and Foreign Missionary Society was named as sole residuary legatee. On the 26th day of September, 1889, the executors filed their account, and by the adjudication of the Orphans' Court, filed on the 4th day of November, 1889, and which was confirmed absolutely, the whole of the residuary estate was awarded to be paid to the society as sole residuary legatee. But the society never took any legal steps to enforce payment of the legacy. Previous to the account being filed Thompson had actually embezzled all the funds of the Saul estate. As inquiry was occasionally made of him from time to time about its payment, Thompson put them off with repeated promises until the evening of the 18th of June, 1890, when his co-executor called on him and requested him to exhibit the securities in which he (Thompson) said the estate was invested. Thompson promised to do this at one o'clock the next day. On the next day (19th inst.) Holly

stepped into Thompson's office to inquire how his business was being proceeded with, and was then falsely informed by Thompson that the papers were ready, that everything would be right and he would have everything settled in a few days, and requested Holly to give him a check for the purchase money, and on that day Holly gave to Thompson his check on the Fidelity Insurance, Trust and Safe Deposit Company for twelve thousand dollars ($12,000) to be applied to the purchase, of which the following is a copy :

(Copy of Check.)

No. PHILADELPHIA, June 19, 1890.

The Fidelity Insurance, Trust & Safe Deposit Co., Pay to Henry C. Thompson, Att'y, or order, Twelve Thousand Dollars.

($12,000.) (signed) JAS. HOLLY.

Thompson thereupon gave Holly a receipt, which was in the words following :

(Copy of Receipt.)

PHILADELPHIA, June 19th, 1890.

Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt of $200, to be applied to purchase of house No. 643 North Fifteenth Street.

($12,000.) (signed) H. C. THOMPSON.

Thompson deposited the check in his own private account with the Union Trust Company, of Philadelphia, and immediately thereafter, on the same day, Thompson drew his personal check upon the said Union Trust Company for fifteen thousand five hundred and seventy seven dollars and fifty-four cents ($15,577.54) to the order of the respondents, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church. He took this check directly to New York and delivered it to E. Walter Roberts, the assistant treasurer, at the

office of the society in that city about one o'clock P. M. of the same day. This check was paid in due course by the Union Trust Company on the 21st day of June, 1890.

At the time Thompson drew his check, he had only about four thousand dollars to his credit in the Union Trust Company over and above the twelve thousand dollars belonging to the complainant. The check of fifteen thousand five hundred and seventy-seven dollars and fifty-four cents ($15,577.54), together with the other checks of Thompson, which were drawn upon the Union Trust Company prior to and including the 21st day of June, 1890, left a balance to Thompson's credit in the Union Trust Company at the close of that day of only eight hundred and twenty-six dollars and three cents ($826.03).

Thus it was proven by the testimony that under pressure of his co-executor's demand to see the securities of the Saul estate at one o'clock of that day, Thompson fraudulently procured from Holly the check for twelve thousand dollars, and with the use of Holly's check and his own check as above stated, he wrongfully turned over Holly's money to the possession of the defendants as on account of the securities and money payable to the Saul estate. The wrongful intent with which Thompson procured Holly's check is also shown by Thompson's letter to his co-executor, written just before he started to New York, as follows:

HENRY C. THOMPSON,
Attorney & Counsellor at Law,
1001 CHESTNUT STREET,

PHILADELPHIA, June 19, 1890.

MY DEAR DOCTOR:

I am going to New York this morning to settle the Saul matter in full with the Board of Missions and also to get their consent to the discharge of the executors. I write to save you the trouble of coming down

at one o'clock and also to ask you to call to-morrow morning at one to sign petition for discharge.

Yours truly,

(Signed) H. C. THOMPSON.

On July 17th, 1890, Holly discovered Thompson's misappropriation of his money, and traced it into the possession of the society, and immediately notified the society of his claim. The money had been deposited by the defendants in the National Bank of New York, and was still on deposit in that bank to their credit at the time (July 17th, 1890) when Holly notified the defendants that it was his money, as is shown by the daily balances of the defendants' account with that bank, which from June 19th to July 18th, 1890, largely exceeded $30,000, after payment of all the society's checks drawn and presented at the end of each day, the smallest balance at the end of any day in that period being July 1st, 1890, when it was $33,431.86, or more than $21,000 exclusive of Holly's money (R., pp. 153 to 171, folios 429 to 499, and p. 195, folios 592 to 595).

On this state of facts the plaintiffs claimed a decree for the return of Holly's money, with interest.

The decree as entered by Mr. Justice WHEELER April 6th, 1898, is in these words (see p. 257 of the Printed Record):

Decree.

"This cause coming on regularly to be heard upon the bill and answer and all the other pleadings, papers and proceedings herein, and upon the proofs submitted, and having been argued by counsel, and due consideration being had thereon;

Now, on motion of Cephas Brainerd, Esq., attorney for complainant, it is hereby

Adjudged and decreed that the complainant James Holly do recover of the respondent The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America the sum of

ten thousand twenty-eight and $\frac{82}{100}$ dollars, with four thousand six hundred forty-one and $\frac{62}{100}$ dollars interest thereon from the 19th day of July, 1890, amounting to fourteen thousand six hundred seventy and $\frac{44}{100}$ dollars, together with the costs of this action taxed by the Clerk of this Court at six hundred and seven and $\frac{98}{100}$ dollars, making in all the sum of fifteen thousand two hundred seventy-eight and $\frac{42}{100}$ dollars, and that he have execution therefor.

(Sd). HOYT H. WHEELER."

Review of the Errors Assigned by the Appellants in Above Case.

The principal contention of the defendants in this case was that Thompson was indebted to the defendant missionary society in an amount greater than the sum of $15,577.54, and that the check for that amount was given to the society in payment of that debt; that this sum was received by defendant in good faith, and without notice of any equity or claim on the part of the complainant.

First, Second and Third Assignments of Error.

It is submitted that the ruling of the learned Judge, which is made the subject of the first three of Defendants assigments of errors, was not erroneous for the reasons set forth in his opinion as filed and upon the authorities cited by him therein, which rule the present case.

1st. It cannot be disputed that Thompson obtained from the complainant Holly the $12,000 as a trust fund.

Thompson filled up the check for $12,000, making it payable to himself as attorney (R., pp. 50 and 94). He drew the receipt, in which he expressly stated that

it was for "Twelve thousand dollars, and J. A. Freeman's receipt of $200, to be applied to purchasing house No. 643 North Fifteenth street." This was an express acknowledgment and declaration on Thompson's part that the $12,000 was obtained from Holly as a trust fund for the purpose mentioned. By Holly's check to Thompson's order as attorney, Thompson was appointed trustee for the fund. This was all that was necessary to perfect the trust as completely as could possibly be done in the creation of any express trust.

"Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons and purposes of the trust."

1 Perry on Trusts, Sect. 24.

2d. Neither can it be disputed that the trust fund was wrongfully, fraudulently and feloniously obtained and misapplied. Holly's money was actually stolen from him by Thompson.

The intent and purpose with which it was obtained is shown by the fact that his coexecutor, after numerous demands had been made upon Thompson, called upon him on the evening of the 18th and demanded to see the securities in which Thompson had all along declared that Saul's estate was invested, and Thompson agreed to produce them the next day, at one o'clock, when his coexecutor was to call andexamine them (R., p. 83, fol. 146–147). After thus promising what he knew he could not perform, and being without other available means to secure the amount required to be paid to the Saul Estate, he took advantage of Mr. Holly's calling the next morning to inquire about his business, to induce Holly, by falsely stating that the papers were ready, to deposit the $12,000 in his (Thompson's) hands for the purchase of the property. Thompson's immediately taking that money and depositing it in his individual account and drawing upon it a check for $15,577.54 in favor of defendants, and handing that check over to defendants

is conclusive of the intent with which Thompson obtained Holly's money. The whole transaction was a continuous one, so far as Thompson was concerned, beginning with his falsely inducing his client Holly to hand him the check, under the pressure of the disclosure of his wrong doings in Saul's Estate, which would inevitably follow if he had not taken this course. Hence, it is submitted that the present case has all the characteristics of a felonious stealing or theft by Thompson of Holly's money with the preconceived purpose of misappropriating it and the immediate carrying out of that purpose to its conclusion. It was one transaction from beginning to end; it was a felonious taking of Holly's check for the whole twelve thousand dollars, as it was intended to be by Thompson, and it was also intentionally misappropriated. It was an absolute theft of Holly's money (R., p. 50, fols. 13–16; R., p. 138, fols. 364–371).

To obtain a bill of exchange from an endorser under pretense of getting it discounted is felony if the jury find that the prisoner undertook to discount it with a preconcerted design to convert the money to his own use. The King vs. Aickles, 1st Leach, 294, cited in 2 East Pleas of the Crown, p. 675, where, on page 682, in the case of a delivery for a special purpose, the general rule is expressed as follows: "Where by the delivery a special property and consequently a legal possession would be transferred there, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired, the taking amounts to larceny."

In Shipley vs. People, 86 N. Y., 375, the owner sold to the accused goods to be paid for on delivery, and delivered them to the carrier with instructions to collect the price before delivering to the purchaser. The latter received the goods and paid for them by a worthless check, and he was held rightly convicted of larceny, the Court, in the course of the opinion, saying: "The jury may have found that this was his scheme at the beginning, and thus that there was on his part a felonious intent, an *animo furandi*, pervading the tran-

saction and continuing to the end; that there was no delivery by the owner or parting with the title, and, if so, the verdict was right."

Smith vs. People, 53 N. Y., 111, reported in Lawyers' Co-operative Edition, Book 11, foot page 419. See editor's notes, foot pages 420 to 422, where the cases on this point are reviewed.
State vs. Henderson, 66 N. C., 627.
Loomis vs. People, 67 N. Y., 322.

In defining embezzlement, Webster draws this distinction between it and larceny:

"Larceny denotes a taking by fraud or stealth from another's possession; embezzlement denotes an appropriation by fraud or stealth of property already in the wrongdoer's possession" (per BROWN, J., in Moore vs. United States, 160 U. S., 268, 269, 270, cited in 1st Bouvier's Dictionary, Rawles' Revision, 655).

Bouvier's definition of larceny is: "The wrongful and fraudulent taking and carrying away, by one person, of the mere personal goods of another from any place with a felonious intent to convert them to his, the taker's, use and make them his property, without the consent of the owner."

The learned Judge, in his opinion (R., p. 253), cites the cases of Wilson & Co. vs. Smith, 3 Howard (U. S.) 763, and National Bank vs. Insurance Co., 104 U. S., 54, and says:

"In the former case the defendant had collected a draft belonging to the plaintiff, received from a person who had received it from the plaintiff, and credited the proceeds to the person from whom the defendant received it on an account before due, without any knowledge that it belonged to the plaintiff or did not belong to him. The plaintiff there was held to be entitled to recover, at law, because the money belonged to him, and no new transaction had arisen between the defendant and the one from whom he received it, but the crediting of it on the previous debt. The defendant here is in the same situation in respect to this money, except that the money was delivered in breach of trust,

which is no betterment. In the latter, after a thorough examination of the cases, money is said to be recoverable by the true owner so long as it is traceable, and its possession with liability of its recovery has wrought no disadvantage."

In this case the learned Judge concludes his opinion in these words : " But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in furtherance of its objects, nor that any of this particular money was applied to any of its purposes." It is submitted that there was no error in this finding on the part of the learned Judge, and that the defendants have not pointed out a single piece of evidence from which it can be inferred that the defendants collected this check of Thompson for value and without notice of the alleged equity on the part of the complainant. There is no evidence whatever to support the position taken by defendants in this third assignment of error. The conclusion reached by the learned Judge in his opinion was that $10,028.82 of Holly's money had, through the wrongful misappropriation of the same by Thompson, gone into the hands of the defendant, and that this money had come directly from and belonged to Holly the complainant.

It is submitted that Holly had never parted with his ownership of the money, and Thompson therefore could not make title to another for property of which he was not the owner.

" If a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the Court will disentangle the accounts and give the *cestui que trust* what belongs to them. And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice ; but the bill must specify the property which it identifies with the trust fund."

2 Perry on Trusts, Secs. 837 and 838.

"The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change."

2 Story Eq. Jur., Section 1258.

"Equity impresses a constructive trust upon this species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except unto those of a *bona fide* purchaser for value, without notice, and the Court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded."

2 Pomeroy's Eq. Jur., p. 1562, Ed. of 1892, Sect. 1051.

"And the better opinion on authority now is that even as to creditors the mixing of trust funds with private in a general deposit does not obliterate the trust."

2 Perry on Trusts, Sec. 828.

"And it may be added that an abuse of trust can deprive the *cestui que trust* of no rights, so long as the property or its proceeds can be traced and identified in the hands of those who have full knowledge of all the equities."

2 Perry on Trusts, Sec. 835.

In the case of Pennell vs. Deffell, 4 De G. M. & G., 372 and 388, Lord-Justice TURNER says: "It is, I apprehend, an undoubted principle of this Court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property

belonging to a trust, however much it may be changed or altered in its nature or character, and all the proofs of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Vice-Chancellor Sir W. PAGE WOOD, in Frith vs. Cartland, 2 Hem. & M., 417 and 420, said that Pennell and Deffell rested upon and illustrated two established doctrines. One was that, "so long as the trust property can be traced and followed in other property, into which it has been converted, that remains subject to the trust;" the second is "that if a man mixes a trust fund with his own the whole will be treated as the trust property, except so far as he is able to distinguish what is his own."

The whole subject was very elaborately reviewed by the Court of Appeals in England in the very recent case of Knatchbull vs. Hallett, *In Re* Hallett's Estate, 13 L. R., Ch. D., 696.

It was there decided that, if money held by a person in a fiduciary character has been paid by him to his account at his bankers, the person for whom he held the money can follow it.

The Master of the Rolls, Sir GEO. JESSEL, in Clayton's Case, 1 Mer., 572, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary relation is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify it.

The principle is illustrated by many cases in this country.

Farmers' and Mechanics' National Bank vs. King, 57 Pa. St., 202.
Van Allen vs. American Nat. Bank, 52 N. Y., 1.

It has been repeatedly recognized in the Supreme Court of the United States. The leading case is National Bank vs. Ins. Co., 104 U. S., 54.

Oliver vs. Piatt, 3 How., 333 and 401.
May vs. LeClaire, 11 Wal., 217.

Bayne vs. U. S., 93 U. S., 642.
U. S. vs. State Bank, 96 U. S., 30.
Manhattan Bank vs. Walker, 130 U. S., 267.
Jones vs. Van Doren, 130 U. S., 684, 691.
Peters vs. Bain, 133 U. S., 670, 694.

In Swift vs. Williams, 68 Md. Rep., 236, decided in the Maryland Court of Appeals, W. and V. were trustees for the sale of certain real estate. W., being about to go abroad, obtained an order from the Court authorizing V. to receive the purchase money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V. a check for the purchase money, payable to the order of W. and V. trustees. V. endorsed this check with his own name only as trustee to the Manufacturers' National Bank for deposit, giving the bank a copy of the Court order, and opened account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V. drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check on reaching the Manufacturers' Bank through the Clearing House was charged to the said account of V. as sole trustee.

The bank on which the check was drawn which was given to V. and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because endorsed by V. alone. V. thereupon arranged with the Manufacturers' Bank to alter the endorsement by signing W.'s name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchasers' check was drawn refused, however, to honor it on such new endorsement, and the purchaser obtained a cashier's check from said bank for the same amount and deposited it in the Manufacturers' Bank to the

joint credit of W. and V., trustees, and took up his own check. Thereupon V. added the name of W. trustee, per V, trustee, to the check he had theretofore drawn on the Manufacturers' Bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V., the Manufacturers' Bank and Swift, to whom the amount checked out by V. was paid, to compel the replacement of the trust money which was misappropriated through the the check given by V. to S. in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted. And, further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per IRVING, J.: "Swift cannot be regarded as a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor, who is paid from wrong funds a purchaser without notice (2 Pomeroy, Eq., 622, and authorities cited."

Swift vs. Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (Ed. of 1892), Sect. 747, note, page 1044, as an authority for the statement in the text that "No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser."

Fourth Assignment of Error.

Under this assignment of error, the contention of the appellants is to the effect that Thompson and Dr. Watson, as executors of the will of James Saul, deceased, having filed their account in the Orphans' Court of Philadelphia County, showing a balance due to the defendant missionary society of $14,927.54, which account was confirmed absolutely November 23d, 1889, thereby became jointly and severally liable to the defendant missionary society for the entire amount (Defendant's Exhibit J, R., p. 249, fol. 325, and Exhibit O, R., p. 44, fol. 170); and, being thus indebted, defendants' counsel contend that the giving of the check constituted the missionary society a holder for value of Holly's money.

The rule that the transfer of negotiable paper before maturity in payment of an antecedent debt constitutes the transferee a holder for value is applicable to negotiable commercial paper alone. It has no application to the transfer of negotiable paper which has matured, or to the payment of a check which is payable on demand.

Moore vs. Ryder, 65 N. Y., 438.

The defendants cannot claim to be *bona fide* purchasers for value without notice in this case, because they were actually informed of facts and circumstances and had oft-repeated warnings which put them upon inquiry, that, if made and followed up, would have led them directly to full knowledge of the embezzlement of the whole of Saul's estate and of Thompson's insolvency long before they obtained Holly's money. With this knowledge of his insolvency Defendants would not have accepted Thompson's individual check as a payment on account of the legacy. The pretense that this was an ordinary commercial transaction is absurd. It has no single feature according with such dealings. The attempted payment of a legacy three years past due in a check not drawn by

the executors, but by an individual, where no release or discharge was given, bears no resemblance to the payment of an individual note by the maker with his own check and receiving that paid note from the holder.

With notice of Thompson's embezzlement, the respondents accepted his individual check for $15,577.54 instead of demanding from him the securities in which they had been informed that the estate was invested. At the same time Thompson handed them the following memorandum, which was in his handwriting:

Estate James Saul:	
Balance as per account filed	$14,927 54
Dividends received since, not included in account	650 00
	$15,577 54

But, in accepting his individual check, they knew that they could only rightfully claim payment of it out of what individual moneys he might then have in the bank to his credit. They could not thereby acquire any property or right to trust funds that Thompson might have obtained from other parties and deposited with his own moneys in his individual account, upon which the check was drawn.

"A check is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer."

Grant on Banking, 85.
Keene vs. Bread, 8 C. B. N. S., 373.

It is contended by the respondents that they became *bona fide* holders for a valuable consideration of this fund by virtue of their having received it on account of this legacy; but the fact is, they did nothing but simply receive the money; they parted with nothing whatever at the time. They did not release Thompson or his co-executor; they simply gave him a receipt as "from Executors Estate James Saul," for so many dollars in money (fols. 130-132). It did not state what

it was on account of, whether it was a legacy or a debt *due* the society.

Under these circumstances the respondents can plead neither innocence nor consideration.

Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by canceling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong; the doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.

2 Pomeroy's Eq., Ed. of 1892, Sect. 918, p. 1302 3, citing Ogilvie vs. Jeaffresen, 2d Gifford, 353.

Swan vs. N. British, &c., Co., 7 Hurlst & N., 603.

Taylor vs. Railway Co., 4 DeGex & Jones, 559.

Donaldson vs. Gillot, L. R., 3 Equity, 274.

Barnard vs. Campbell, 58 N. Y., 73; s. c., 55 N. Y., 456.

The respondents had ample notice of Thompson's repeated defaults in respect to the payment of the legacy, by reason of his repeated refusals to make any reply to their inquiries. Each refusal was sufficiently aggravated to put the respondents upon further inquiry, that if followed up would have led directly to the discovering of Thompson's embezzlement of the Saul estate long before he could have obtained possession of Holly's money, and perhaps in time for them to have saved or recovered at least a part of the embezzled funds.

By the law of Pennsylvania, after one year from testator's death, proceedings might have been taken (R., p. 74, fol. 111 ; p. 100, fol. 215) that must have compelled a disclosure by Thompson of his conversion of part of the securities of the estate and the handing over of the remainder of them to respondents at that time.

"Where a judgment of a foreign court was offered in evidence in Wisconsin judicial notice was taken of the law of the state where it was rendered."

Jarvis vs. Robinson, 21 Wis., 523.
Cutler vs. Wright, 22 N. Y., 472.
Condit vs. Blackwell, 19 N. J. (Eq.), 193.
State of Ohio vs. Hinchman, 27 Pa. St., 479.

But, as a matter of fact, the defendants were actually informed by Thompson, December 28, 1887, that they might expect payment of the legacy in the summer or early fall of 1888.

The respondents had at least eight additional notices or warnings relating to Thompson's embezzlement of the Saul Estate.

1. By receiving no reply from Thompson to letter from respondents to him, dated July 26, 1888, stating that "the fiscal year of this Society closes September 1st," and asking "whether it is likely that the Society's interest under the will of the late Dr. Saul can be paid by that date" (Exhibit C, Defendants' Supplemental Answer, R., p. 38, fol. 147).

2. By receiving no reply from Thompson to letter from respondents to him, dated February 20, 1890, in which respondents wrote as follows : "We received in Dec., 1887, a letter from you respecting the Estate of the Rev. Dr. Saul in which you said that this Society might expect to receive the residuary interest in the summer or early fall of 1888. Will you kindly inform us further in the matter ?" (Exhibit E, Defendants' Supplemental Answer, R., p. 39, fols. 151 and 152).

3. Letter of Dr. Watson to respondents, dated April

15, 1890, in which he writes as follows: "If the legacy is not forthcoming this month, so as to be acknowledged in the May number of the 'Spirit of Missions,' you yourself should stir up the gentleman in the matter" (Exhibit F, Defendants' Supplemental Answer, R., p. 40, fols. 153–155).

4. By receiving no reply from Thompson to letter from respondents to him, dated April 17, 1890, in which respondents wrote: "Not having heard from you in reply to my last Feby. 20 inquiring about the bequest of Rev. Dr. Saul to this Society, I write now to ask if you will inform us of the reason for delay in paying the legacy. You wrote us in 1887 that we might expect it in the summer or early fall of 1888" (Exhibit G, Defendants' Supplemental Answer, R., 40, fols. 156 and 157).

5. Postal card of Dr. Watson to respondents, dated April 25, 1890, saying: "Mr. T. has just informed me that he will send on the money to-morrow" (Exhibit I, Defendants' Supplemental Answer, R., p. 41, fol. 160).

6. Letter of Dr. Watson to respondents, dated April 29, 1890, asking "Did the money reach you the next day, as I wrote you it probably would, or not? I am anxious to know" (Exhibit J, Defendants' Supplemental Answer, R., p. 41, fol. 161).

7. Letter of Langford to Dr. Watson, dated May 24, 1890, saying: "We have heard nothing from your co-executor, although we have written to him several times since he wrote that the legacy would be paid in the summer or fall of 1888. It is almost a month since you wrote us that he had promised you that he would send it to us the next day" (Exhibit K, Defendants' Supplemental Answer, R., p. 42, fol. 163).

8. Letter of Dr. Watson to respondents, dated May 29, 1890, saying: "My co-executor seems to be invul-

nerable to any shaft that you or I may send. After learning of the forfeiture of his last word, I wrote him as sharp and scathing a letter as I knew how. But it does not seem to have disturbed him a bit, for he has sent no reply" (Exhibit M, Defendants' Supplemental Answer, R., p. 43, fols. 166–168).

What more positive notice of an embezzlement or defalcation could there be than was given to respondents in this case? A neglect or refusal to pay, after eight or ten different demands, is the strongest kind of proof that a debtor either is insolvent and therefore cannot pay, or that he is wrongfully making use of the money for his own purposes, which, in either case, is nothing less than evidence of an actual embezzlement of trust funds.

Watson's last notice to respondents, on May 29th, 1890, was received twenty days before Thompson obtained Holly's money. On any day within that time, had respondents promptly taken a two hours' ride from New York to Philadelphia, and personally demanded from Thompson the delivery to them of the money and securities of Saul's estate, they would as promptly have learned the fact that he had long before embezzled all the moneys and assets of the Saul estate and was hopelessly insolvent.

This is proven by the facts and circumstances which led to the discovery by the trustee of Thompson's embezzlement of other trust funds, at or about the same time that Holly's money was obtained. The Real Estate Title Company, of which Thompson was then solicitor, and also a director, having accidentally learned that Thompson had been instrumental in securing for the company the appointment of trustee for an estate, and thereby received into his hands the trust funds, demanded from him immediate payment of the same; he was forced to acknowledge that he had used the funds and could not pay over the same as required. He was compelled at once to resign his position with the company, and to secure the company against loss by giving a mortgage, date June 23, 1890

(Holly's money was obtained June 19, 1890), on his mansion house and real estate in New Jersey, for fifteen thousand dollars, to cover the amount of defalcation to that company. Had the respondents used the same diligence on receipt of Watson's letter of May 29, 1890, and thereby learned of Thompson's defalcation, they might have obtained the security of Thompson's mortgage before the Real Estate Title Company had learned of his embezzlement of their funds (R., pp. 109–112, fols. 252–262).

It was respondents' gross neglect that prevented them from making the discovery, after so many repeated warnings; they are chargeable, not with notice of mere suspicious circumstances, but with actual knowledge of the embezzlement, as fully as if they had followed up these repeated notices, and thereby became actually informed of it.

When the defendants received the individual check of Thompson, they evidently looked upon it with suspicion, for Mr. Roberts, the assistant treasurer, testified in his cross-examination as follows (R., 222, fols. 222 & 223):

"118 x-Q. Suppose you state as nearly as you can what conversation took place between you? A. I have the original memorandum handed to me with the check. Mr. Thompson simply said, 'I am Mr. Thompson (mentioning his initials). Here is so much on account of the Saul legacy,' and he made a check with this memorandum and asked me for a receipt on account. I left Mr. Thompson and went into the secretary's room and we spoke together. I made out a receipt and handed it to Mr. Thompson and he went out."

What passed between Mr. Roberts and the secretary is not given in this testimony, but the receipt on its face indicates acceptance with suspicion attending it. It is in these words (R., p. 79, fols. 130 & 131):

NEW YORK, June 19th, 1890.

Received from Executors Estate James Saul, late of Philadelphia, Pennsylvania, Fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

$15,577.54.

GEORGE BLISS,
Treasurer.
per E. WALTER ROBERTS,
Ass't Treasurer.

Let it be remembered that only about three weeks before this defendants were informed by Dr. Watson that "most of the legacy was in bonds and so accumulating interest to the credit of the legatee." But they receive Thompson's individual check without asking a question *(R., p. 43, fol. 168)*.

"When a party having knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, does not make, but on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of these facts, which, if he had used ordinary diligence, he would readily have ascertained."

Wade on the Law of Notices, 2 Ed., Sec. 11, p. 9.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it."

Kennedy vs. Green, 3 Myl. & K., 699.

"The presumption is that if a party affected by fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

Angell, Lim., Sec. 187 and note.
Wood vs. Carpenter, 101 U. S., 135, 143.

"Proof of circumstances short of actual notice, which should put a prudent man upon inquiry, authorizes the Court or jury to infer and find actual notice," per HARLAN, J., in

Shauer vs. Alterton, 151 U. S., 607, 622.

In Swift vs. Williams, 68 Md., 236, it was held that the defendant, the Manufacturers' National Bank, was guilty of such negligence in failing to make inquiry as to charge it with knowledge of the true state of facts which would have been obtained by proper diligence. Then, as to Swift, it was held,

Per IRVING, J. (p. 251): "But as this is a suit for money which has been paid to Swift from an estate against which he had no claim, and from which he was not entitled to be paid, and which he has really received in mistake, so far as he is concerned; it seems to us to be wholly immaterial whether he or his counsel had actual or constructive notice of the fact that the money paid was not such money as he was entitled to have paid to him."

Fifth and Sixth Assignments of Error.

Defendants' counsel further contended at the trial that the defendant missionary society had expended the proceeds of Thompson's check before they had knowledge of Holly's claim.

This is not in accord with the facts as proved. The bank account of defendant with the National Bank of New York (R., pp. 153-171) shows that on June 20, 1890, there was a balance to the credit of the defendants in that bank of $43,569.83; that on that day there was a deposit of $16,540.26. The deposit ticket for this amount was produced and showed that Thompson's check for $15,577.54 was included in that deposit. The total amount of the balance in bank, including that day's deposit, was $60,110.09. Between June 20, 1890, and July 18, 1890, inclusive, when notice was received by the defendants that the money belonged to Holly, the defendants had received and deposited additional

sums of money, amounting to $45,265.81, making a total of deposits from June 20th up to July 18, 1890, of $105,375.90. Against this, the society had drawn checks for $74,663.96, leaving a balance of moneys belonging to defendants of $30,711.93 on deposit, July 19, 1890, the day after they received the notice that it was Holly's money, or $18,711.93 of their own money, exclusive of the $12,000 of Holly's money. During all this interval of time there was not a single day in which there was not a balance of money belonging to the society on deposit in the National Bank of New York largely in excess of the amount which belonged to Holly, and, therefore, the money belonging to Holly and not to the society, was not touched by check or draft during all that time. The defendants can only be presumed to have drawn upon their own funds and not upon any of which they obtained possession or control through the fraud of Thompson as their executor and trustee of the moneys belonging to the Saul estate. They could not profit by the fraud of their agent in paying them the money which their agent knew at the time belonged to other parties (see R., p. 195, fol. 592 to 595).

U. S. vs. State Bank, 96 U. S., 30.

Defendants further claim to be holders for valuable consideration upon the idea that having receiving the money as legatees under the will of Dr. Saul, and their assistant treasurer having clerically gone through the form of dividing the amount by three, that thereupon the moneys received from Henry C. Thompson, executor, as alleged in the fifth section of the supplemental answer (fols. 129, 130), were expended for domestic missions, foreign missions and for the benefit of the colored people in the southern or formerly slave States for the support of schools and missions, and the application is declared to have been made under a resolution of the board, passed on the 10th day of June, 1890 (fols. 172, 130). But this application could not affect moneys which belonged to another, but only such as rightfully went into the treasury of the society

for the purpose. As late as August 4, 1890, after all their previous checks had been received and paid by the bank, they still had in bank the sum of $18,610, and at no time prior thereto did they have a less sum on deposit to their credit.

The rule of legal accounting requiring that the first debit shall be charged against the first credit in an account has no application to this case. Under no circumstances could it apply to funds fraudulently obtained and deposited to the credit of the society, when the defendant had their own funds that could properly be drawn upon at the same time to meet their expenses. Deposits were made from time to time as the business of the society was ordinarily conducted, and their checks were drawn upon their deposits in the usual course, and therefore could not affect a fund which had been fraudulently transferred to their deposit account, but only their own funds, so long as those funds should be sufficient for the purposes of their business. If they had exhausted their own funds on any day between the 19th of June and the 18th of July, and had to take from Holly's money to make up the payments of the day, there might be some ground for the contention, but there was not a single day within that period when their own funds were exhausted, and, consequently, Holly's money lay in the bank wholly unaffected by their drafts upon funds which rightfully belonged to them.

Seventh, Eighth, Ninth, Tenth and Eleventh Assignments of Error.

The defendants' counsel further contended on the trial and here (Point IV.) that there was no competent evidence to show that any money of the complainant ever came into the hands of the defendant missionary society; that the books of Thompson as produced and offered in evidence were, as regards the defendants, the merest hearsay, and therefore incompetent and in-

admissible. To these errors, as thus assigned, it is replied:

First. That Henry C. Thompson was executor and trustee for, and as such the representative of the defendants at the time these entries were made in his books, and they were, therefore, the principal's entries as much as they were those of its representative in the trust.

They were not the private entries of third persons, but they were the entries of an agent or trustee in regard to the trust fund, showing his transactions relating to that fund, by which, as against third parties, the principal as well as the representative is bound. In this case the defendants allege that they had received this money in payment of a legacy of the Saul estate. What was the answer to this? Their trustees' own account showed that the money which Thompson had received on their account had long since been appropriated to his own use. How was this "hearsay," or how was this evidence incompetent, it being the evidence from his books of charges against his interest as that of their own trustee?

The relation of Thompson and his co-executor as their trustee was the same after the adjudication had been made of the executors' account as it was before the adjudication. The adjudication was an award of the residuary estate to the defendants, in money or in kind, in the condition that it was then supposed to be. Thompson was still occupying the position of trustee for these defendants at the time he took Holly's money and was acting as such trustee when he made payment to his *cestui que trust;* he was not acting in the ordinary capacity of a debtor to the society. The only effect of the adjudication was to charge the executors as trustees with the balance of the estate then in their hands as fixed by the inventory and appraisement with which they stood charged in their account as adjudicated.

"He [the executor] is considered as a trustee holding a resulting trusteeship for those entitled, either as

residuary legatees or next of kin. At no one time in this State was it [the appointment to an executorship] an extinguishment of the debt [due by an executor to the decedent], for the executor has always been held as a trustee" (Wilson vs. Wilson, 3 Binney, 557; per STERRETT, J., in Pringle vs. Pringle, 130 Pa. St., 565, 569).

Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act, while it is in progress, is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations explanatory of these acts are admissible; nor in proving such declarations is it necessary that he should be himself called.

2 Wharton's Evidence, Sec. 1173.

The entries in the bank-book of Thompson and in his diary, and the deposit ticket, were, with the original checks, the immediate accompaniments of the fraudulent acts of Thompson, and admissible as part of the *res gestæ*.

"Coincident business declarations are hence to be received to qualify the acts to which they relate."

1 Wharton's Evidence, Sec. 262.
See, also, 1 Greenleaf's Ev., Sec. 115.

SECOND. It is not necessary to go over all evidence as to whether or not the defendants had in their bank at the time of the notice this money of Holly. Complainant's Exhibit No. 9, R., pages 136 and 195, taken in connection with Mr. Burton's testimony (R., pp. 136 and 137, fols. 356–363) put this beyond question. From the day they deposited Thompson's money in the Bank of New York down at least to August 5th the current charges of the defendant were paid out of honest money, and the stolen fund remained in that bank to the credit, in judgment of law, of Holly, the man from whom Thompson had taken it.

Defendants say that Holly opened a debtor and credit account with Thompson. If this be so, then the fiduciary relation of attorney and client has disappeared. But, when a client delivers a bag of money to his lawyer and takes from him a receipt which declares, in accordance with the fact, that the money is to be applied to the payment of the client's purchase price of a specific lot of land, that attorney becomes something more than a mere debtor. The suggestion that money has no "earmarks" would be good if it were not that courts of equity have for years been engaged in tracing stolen money and making decrees restoring it to the legitimate owners.

In re Irish-Am. Bk., 73 N. W. R., 6.

Twelfth Assignment of Error.

The twelfth assignment of error is that the plaintiff had previously commenced an attachment proceeding, and was thereby estopped from maintaining this suit against the defendant.

The facts in this record are as follows: The plaintiff Holly was in ignorance as to the true state of his business with Thompson until the 15th day of July, 1890 (Q. 21, R., p. 50). He applied to his Philadelphia counsel, Mr. Burton, the same evening (Q. 6, R., p. 129). On the next morning the investigation was commenced, and, on the partial information then obtained, the affidavit was prepared which was made and filed (R., p. 175, fols. 512-523) on the 17th day of July (fol. 536), when the attachment as it bears date was issued and served (fols. 538-540).

Prior to the issuing of the attachment Mr. Burton had been unable to ascertain the history of the transaction. He was told by the bank that no information could be given him "unless it was in response to legal proceedings that had been taken" (R., p. 130, fol. 133). The desired information could not be obtained until after counsel for Mr. Holly had instituted attachment proceedings and had served it upon the bank which

had collected Thompson's check for the society in New York. Then, in response to Mr. Burton's inquiry (R., p. 130, fol. 335), he ascertained the course which the fund of his client had taken, and that the check was drawn to the order of the society respondent (R., p. 130, fol. 335). Mr. Burton immediately addressed a letter to the defendants (see defendants' answer, R., pp. 20 and 21, fols. 80–83), enclosing copy of plaintiff's affidavit in the attachment suit.

Now, what happened after that? Nothing whatever was done in the attachment proceeding. On the same day Thompson had previously made an assignment for the benefit of creditors to his son, which was recorded at 12:39 P. M. at Philadelphia (R., pp. 58 and 59 and 188, fols. 48 and 566) about two hours before the attachment was served on Thompson's assignee.

At the time of the assignment Thompson was indebted in something like the sum of one hundred thousand dollars, and the total of the assigned estate, as stated by his assignee, was about twenty-five hundred dollars (R., p. 97, fols. 203, 205).

Immediately upon discovering the fact that the money had been traced into the defendant's deposit account with the Bank of New York, defendants were notified that it was complainant's property, and that he (Holly) claimed the money in their hands as his property and demanded a return to him of the same. This was clearly an election on his part at that time to claim the funds in the defendant's hands, and no action since then has been taken by Holly inconsistent with that claim.

The proceedings were allowed to remain in suspense, however, until it became necessary, by the action of Thompson's assignee for the benefit of creditors, in moving, on January 26th, 1894, to dissolve the attachment, to make some disposition of that case on the ground set up in his petition that Holly had refused to present any claim or submit any proof of claim (R., p. 189, fols. 569–571). This motion was pending when the plaintiff applied to this Court for leave to continue the proceeding, in order that what-

ever moneys might be obtained from Thompson's assigned estate should be applied to the relief of whoever would eventually be the losing party in this suit—this to be without prejudice to the rights of either party in this proceeding, but it was objected to and resisted by the respondent's counsel on the ground that the complainant had already elected his remedy under the attachment proceeding, and had no right to recover the money in the present proceedings. The Court refused the application, having no precedent for granting such leave where the opposite party either rightfully or wrongfully objected.

Up to the time when this application was made, the respondents had not suggested in their answer or supplemental answer to the bill any defense grounded upon the alleged election of an inconsistent remedy by Holly in the issuing of the attachment process above referred to, and, in so far as this record is concerned, the defendants did not at that time or subsequently thereto make this defense to the present action.

In equity it is the law that no defense can be set up against a bill filed in the case unless that defense is specially made in the plea and answer to the bill as filed. In this case, to any argument that may be presented for the purpose of showing that the plaintiff had elected his remedy and was estopped thereby from pursuing this suit, we answer that no such defense was set up, and therefore no such defense can be available as a defense at this time.

"When a defendant makes his defence by answer, he must set up all the various grounds of defense upon which he intends to rely."

Warren vs. Warren, 30 Vt., 530.

But inasmuch as this point, as to complainant's having elected his remedy, was raised by the respondents in opposition to the motion for leave to prosecute, on the 14th day of April, 1894, the complainant Holly, with leave of the Court where the suit was pending, paid the costs of the attachment in Philadelphia, and discontinued the same (R., p. 173,

fol. 507; Complainant's Exhibit No. 8, R., p. 173). The entry of discontinuance as it appears on the exhibit is in the form in which discontinuances are entered according to the practice of the Courts in the State of Pennsylvania (R., p. 135, D. 20, fol. 355).

By discontinuing the attachment proceedings, the complainant reiterated his election to rely solely upon his right to recover from the respondents his property, the title to which he never had parted with, but has always insisted upon up to this date.

The doctrine of a conclusive election of one of several remedies by personal action rests on an equitable estoppel, but at any time previous to an adjudication he may discontinue the first action and proceed with the second.

Johnson vs. Frew, 33 Hun (N. Y.), 193.

"A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found."

Powers vs. Benedict, 88 N. Y., 605.

"An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof." See opinion by SMITH, J., in

Equitable Co-operative Foundry Co. vs. Hersee, 33 Hun, 169.

In Loeb vs. Willis, 100 N. Y., 231, 235, it is said: "If a suit be discontinued at any stage, it is not an estoppel or bar in any sense. By the discontinuance of an action, the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."

Citing Bigelow on Estoppel, 21.

In Webb vs. Buckalew, 82 N. Y., 555, it is said: "Where the litigation has ended in a discontinuance, so that an actual decision on the merits has not been reached, the proceedings have no conclusive character and cannot operate as a bar."

Citing

Carlisle vs. McCall, 1 Hilt., 399.
Audubon vs. Excelsior Ins. Co., 27 N. Y., 216.

In Lloyd vs. Brewster, 4 Paige Ch., 537, cited by appellants, the second syllabus reads thus:

"If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined."

In Mattlage vs. Poole, 15 Hun (N. Y.), 556, it appears that an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. Held, that so long as no judgment was entered, the plaintiff's act in suing both did not constitute an election to hold the principal and discharge the agent.

In Bach vs. Tuch, 47 Hun (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. Held, that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow vs. Littel, 41 Hun (N. Y.), 395, A obtained plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A and obtained an attachment. Then, learning that A had transferred the goods to B, plaintiff discontinued and sued B. Held, that the action against B was maintainable.

In Hays vs. Midas, 39 Hun (N. Y.), 460, A was induced by B's false and fraudulent representations to sell goods to him. A began suit on contract and at-

tached the goods. Fifteen other attachments preceded A's. A discontinued and began a replevin suit to recover the goods. There was no evidence that when A began his attachment suit he knew of the fraud. Held, that he could maintain his replevin suit.

In Fowler vs. Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife, E. The pass-book read: "In account with W. for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass-book and received the deposit. Held, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. But the Court (EARLE, J.) said: "If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property."

The decree of the learned Judge for $10,028.82 went, upon the ground that so much of Holly's money was by Thompson's check turned over to defendants. By this finding there was left in Thompson's hands $1,971.18, which was wrongfully paid out by him to other parties, and for which the attachment might properly (in the view of counsel for appellee) have been continued, but to avoid all questioning on this point the attachment was discontinued, and the costs of suit paid by plaintiff.

In the present case, it is difficult to understand how the prosecution of a remedy for the recovery of so many dollars out of Thompson's estate as might have been had under the attachment proceeding, and would

necessarily be in relief of the respondents in this proceeding, can be considered as an inconsistent remedy, debarring complainant of his rights in the present action.

It is therefore submitted that the decree of the trial Judge should be affirmed and the appeal dismissed at the cost of the appellant.

New York, December, 1898.

CEPHAS BRAINERD,
Solicitor for Complainant and Appellee,
47 Cedar Street.

ARTHUR M. BURTON,
Of Philadelphia,
Of Counsel.

Supreme Court, U.S.
FILED
NOV 9 1900
JAMES H. McKENNEY,
Clerk.

138.

of October Term, 1900.

Brief of Simpson, Brainard & Johnson
for Appellant.

IN THE

reme Court of the United States.

IN EQUITY.

Filed Nov. 9, 1900.

James Holly, Petitioner and Appellant,

vs.

Domestic and Foreign Missionary Society of
e Protestant Episcopal Church in the United
ates of America and E. Walpo Sickels,

(RECORD No. 17,523.)

PEAL OF JAMES HOLLY FROM THE UNITED STATES
RCUIT COURT OF APPEALS FOR THE SECOND
RCUIT.

BRIEF FOR APPELLANT.

10343

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

James Holly, Petitioner and Appellant,

vs.

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and E. Walter Roberts.

October Term, 1900.

No. 138.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

By his will and codicils, the Rev. James Saul, of Philadelphia, who died on the sixteenth day of November, 1887, gave his entire residuary estate to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America. (Record, page 179.) The inventory of the estate was not put in evidence, but it appeared (Record, page 105) that in addition to some $2493.03 cash, the testator was possessed of bonds of the North Penn Railroad and of the United Railroads of New Jersey, which were sold by Trotter, a broker, in August, 1888, and in February, 1889, upon the order of Thompson, one of the executors,

for $13,924.75. The fact that these sales had been made does not appear to have been known by Watson, one of the executors, nor by the missionary society, until after the settlement with the missionary society had been made. It was established by the production of the account book kept by Thompson.

It appeared (Record, page 50) that the last moneys in the Saul estate, either by way of dividends or from sale of securities, were received on the eleventh day of March, 1889, and that on the twelfth day of March, 1889, all had been withdrawn by Thompson. The son of the latter (Record, page 50) testified :—

> × Q. What was the total of the moneys deposited from the Saul estate between the dates of December 29th, 1887, and March 11th, 1889? A. $18,912.78. × Q. And the account book shows that all that money was drawn out of Mr. Thompson's bank on March 5th, 1889, except $315.99? Is that so? A. Yes, sir. × Q. No part of those moneys so paid out, to your knowledge, was paid to the board of domestic and foreign missions, was it? A. No, sir.

In 1889 Thompson and Watson filed their account as executors of the said estate, in which they charged themselves with the estate as the same had been invested. (Record, page 179.) This was duly audited by the Orphans' Court of Philadelphia County, which court had sole and exclusive jurisdiction thereof. The adjudication by one of the judges, the Hon. W. N. Ashman, was filed on the fifth day of November, 1889, and was duly confirmed. (Record, page 179.) In it the judge said: "Vouchers were produced for the credits "claimed in the annexed account, and the distributive bal- "ance was shown to be $15,803.70." A balance of $14,927.54 was ascertained by said adjudication to be in hand, and it was said, regarding the same, "which is awarded to the Domestic "and Foreign Missionary Society of the Protestant Episcopal "Church in the United States of North America."

Excepting Thompson, all were ignorant of the fact that the property had been converted to his use by the former, and

that no estate remained. The decree was made upon the supposition, induced by the account itself, that an estate was in hand for distribution amounting to $14,927.54, which, under the terms of the will, was awarded to the residuary legatee.

The co-executor, Watson, though he thought Thompson was dilatory in his settlement, claimed, probably truly, that he had no suspicion the estate had disappeared. He (Record, pages 60, 61) testified:—

> Q. You supposed, when the account was filed, that as soon as it would be settled, it would be paid? A. Yes, sir. Q. Did you know when these securities were sold? A. No; I never knew they were sold. Q. Did you suppose they were on hand at the time of the adjudication of the account? A. I certainly did. I supposed they were in his safe. Q. And you never knew that they were sold at all, did you, until about the time the money was paid over, or did you know when they were sold at all before that? A. I didn't know they were sold then. Q. Did you ever ask Mr. Thompson to show you those securities from the time that you handed them over to him until the time this money was paid over? A. I did. Q. When and how long before? A. A very few days before the money was paid over. Q. What answer did he give you? A. That if I came down the next day he would have the securities there at his office. Q. Do you mean the 19th? A. Yes, sir; I was to come down the 19th, and he would have the securities—the bonds, as I called them—at his office, No. 1001, and the next morning I got this note that you have just read. Q. Had you never before that asked for these bonds to look at them or see them? A. No, sir; because I never had any suspicion of his honesty. The bonds were given him to keep until he transferred them as bonds to New York. Q. But you never made any demand upon him positively for the exhibition of those bonds, or the production of them to you, from the time that you handed them over to him until that day? A. No, sir; not to my recollection. I don't think I did, and I don't recollect it. Q. Did you or did you not suppose that you would have to sign the transfer of those securities in any shape or form, as executor? (Objected to as immaterial.) A. I did not. It didn't come into my mind at all. You will understand

that I am not a business man. Q. This letter states on April 15th, 1890, as follows: "Has the treasurer yet received the legacy to the board of the late Dr. Saul? Mr. "Thompson, my co-executor, promised me more than two "weeks ago that you should have it this month. Has it "reached you? It is no fault of mine that the money was "not paid over more than a year ago, and I am disgusted "at the shilly-shallying which has deferred it to this late "day. I have offered, time and again, to take the whole "charge of the business and relieve him of it, but as he is "a lawyer and presumably a man of business, I couldn't "press him." Did you, at the time you wrote that letter, understand that the securities had been turned into money? A. No. When I say money there, it was simply a general term in my mind for money's worth. I meant the bonds. Q. You say in this letter that you had offered time and again to take the whole charge of the business. For how long a time had you been making that offer to him? A. Every time I saw him, nearly, and he declined. Q. Do you mean from the time of the adjudication. A. Do you mean when the account was rendered in court? It was soon after that, I suppose. Q. Were you present when the account was settled in court? A. Yes, sir. Q. Did you or did you not understand from Mr. Thompson that after the confirmation of the account—that is, when the adjudication was filed—unless exceptions were filed to the adjudication within two or three weeks, the money would be payable forthwith, or that the legacy would be payable forthwith? A. My understanding was that it would be payable at once; yes, sir. I supposed it was payable at once, of course. I wanted it settled within two or three months afterwards, but, as a lawyer, he said to me, "The judges are not disposed to give us a quittance "until within a year," and I supposed he knew more about the law than I did. Q. You were then told that within a year the account should be settled in the first instance? A. That is what I inferred from what he said. Q. Did you say that to the officers of the Domestic and Foreign Missionary Society in any of your interviews with them? A. No, sir; I don't think I had any correspondence with them until the end of the year. I was satisfied, from his being a lawyer, with his statement that the judges did not care to release us until the year was out. You see, that is one of the difficulties about a layman in the hands of a lawyer. He may be misled.

On the 29th May, 1890 (Record, page 32), Watson wrote to Langford, general secretary of the missionary society, in these words:—

162 N. 20th St.,
PHILADELPHIA, May 29th, 1890.

MY DEAR DR. LANGFORD:—My co-executor seems to be invulnerable to any shaft that you or I may send. After learning of the forfeiture of his last word, I wrote him as sharp and scathing a letter as I knew how. But it does not seem to have disturbed him a bit, for he has sent no reply. Yesterday I called at his office to give him a piece of my mind in spoken displeasure, but after waiting for him till I was tired I came away with my wrath still bottled up. I have now spoken to a lawyer on the subject (a prominent member of our church here) and he has promised to give me his assistance.

He says that Thompson is a good man, and a busy lawyer, but dilatory & procrastinating to the last decree; the latter I am quite sure is true—too true.

You may depend upon it I will now follow the matter up; for my own peace & quietness, if nothing else. For your information I will say, that most of the legacy is in bonds; so that it is accumulating interest to the credit of the legatee.

Faithfully yours,

BENJAMIN WATSON.

Watson (Record, page 63) testified:—

Q. You said just now that you had never written to them to inform them of that fact. Please look at the letter of May 29th, which I now hand you, and state whether you did not write to them and tell them that they were in bonds, &c., "For your information, I will "say that most of the legacy is in bonds, so that it is ac- "cumulating interest to the credit of the legatee." Did you not write that? A. Of course I wrote it. × Q. That was on the 29th of May, was it not? A. Yes, sir. × Q. That was your understanding, was it? A. Yes, sir. × Q. From beginning to end? A. Yes, sir. × Q. That the estate was maintained in bonds? A. Yes, sir. × Q. And that the bonds were to be delivered over to the society? A. Yes, sir. × Q. That letter was written in pursuance and in accordance with that understanding,

was it not? A. Yes, sir; certainly. I had nothing else in my mind than that. I don't know when Mr. Thompson first informed them that he was an executor, and about the amount that would come to them. I don't know whether he stated then that it was in bonds or not, but that was the understanding between us. It was more than an understanding. It was at his own suggestion, and I agreed to it. I have not said anything to contradict that.

On the 19th June, 1890 (Record, page 58), Thompson wrote to his co-executor:—

PHILADELPHIA, June 19th, 1890.

MY DEAR DOCTOR:—I am going to New York this morning, to settle the Saul matter in full with the board of missions, and also to get their consent to the discharge of the executors. I write to save you trouble of coming down at one o'clock, and also to ask you to call tomorrow morning at one to sign petition for discharge.

Yours truly,

H. C. THOMPSON.

At this time, and for a long time before, Thompson was hopelessly insolvent.

The manner in which Thompson obtained possession of the money of Holly, which, a few days later, was handed over by him to the missionary society, was shown by the latter, (Record, page 35), who testified:—

Q. When was the last time you employed Mr. Thompson? A. It was the time I bought the property where I reside, No. 643 North Fifteenth street. I bought it at Freeman's auction house in 1890. THE WITNESS: I went to one of the heirs and got the deed, and took it to Mr. Thompson to have the papers made out for me, and he told me that he knew all about that estate and that it was all right and that it was not necessary to have it insured, and I told him I didn't care about having it insured. Q. About what time was it that you took the deed to him? A. I think it was in May, 1890. Q. You employed him to make out the papers. A. Yes, sir. Q. State how it was that you came to hand him any money at the time, and for what purpose you handed it to him. A. I took the deed to him, as I stated before, and he said he knew all

about that property and it was not necessary to have it insured. I got that from Mr. Morgan, one of the heirs, and took the deed to Mr. Thompson, and he said he knew all about that property. I gave him the deed and told him I wanted him to make out the papers for me and have that property transferred to me. Q. Coming down now to the time when you paid him over the purchase money for settlement, state what occurred. A. I went two or three times to see if the papers were not made out, and they were not made out. They had to have them signed by some of the heirs living up in the State. The last time I went to him, he told me that the papers were ready; that everything would be right and he would have everything settled in a few days; for me to give him a check. I gave him my check; he wrote me a receipt and I left him. Of course, I didn't go near him for a time, because he had made the papers for me on two occasions before and it was several weeks, if not months, before I received the papers always—always several weeks, if not months. I think there were some of those papers two or three months before I received them after he had made out the title. Q. How much money did you pay him over, and is the receipt which I now show you the receipt for it? A. Yes, sir; I paid him a check for $12,000 on the Fidelity Trust Company. Q. (Check handed witness.) Is that the check? A. Yes, sir.

Holly's payment was made on the 19th of June. The receipt given (Record, page 6) was in these words:—

PHILADELPHIA, June 19th, 1890.

Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt of $200 to be applied to purchase of house No. 643 North Fifteenth street.

H. C. THOMPSON.

$12,000.

The associate secretary of the society (Record, page 147) swore that he had only once seen Henry C. Thompson, viz., when the check for fifteen odd thousand dollars was paid. He testified:—

× Q. Did your society give Mr. Thompson a release at that time? A. I can only answer to the best of my

knowledge and belief that I do not believe any release was given.

The same witness (Record, page 151) swore:—

And is it your impression that this check was received in part payment of a legacy from Dr. Saul? A. Yes, sir. Rd. Q. Will you kindly state what was said and done? A. My impression is that I was standing by, having been introduced to Mr. Thompson, and that when the check was handed over he intimated that he only wanted a usual receipt, as there was a balance to be paid in a short time. Rd. Q. A balance upon what? A. The Saul legacy.

Another official of the society, Roberts (Record, page 157), swore:—

Q. You were present when Mr. Thompson came with this check? A. I was. × Q. Did you give him a release? A. No, sir. × Q. What did you give him? A. Simply a business receipt. × Q. Would you take the responsibility of stating it on the record? A. Not remembering the exact words of the receipt and all the surrounding circumstances, I could not. × Q. Your recollection is that you gave him a receipt for so much money? A. Simply that and nothing more. × Q. Running in about what terms? A. Received from so-and-so so much money on account. × Q. Did he ask you for a release? A. No. × Q. Did he not present a release to you? A. He did not. × Q. How long was he with you? A. Possibly five minutes; long enough to have the receipt made out. × Q. He did not present any bonds? A. Nothing whatever. × Q. Did you ask him about any bonds? A. No. × Q. Or securities of any sort? A. No. × Q. So that practically all that passed between you was that he came in, announcing that he was Mr. Thompson, and presented this check, and you gave him a plain receipt for it, and he left? A. Exactly. × Q. That is all there was to it? A. That is all; yes. × Q. Suppose you state as nearly as you can what conversation took place between you. A. I have the original memorandum handed to me with the check. Mr. Thompson simply said, "I am "Mr. Thompson (mentioning his initials). Here is so "much on account of the Saul legacy," and he made a

check, with this memorandum, and asked me for a receipt on account. I left Mr. Thompson and went into the secretary's room, and we spoke together. I made out a receipt and handed it to Mr. Thompson, and he went out. (Memorandum offered in evidence, and marked "Respondent's Exhibit I.," of this date. Counsel for complainant takes exception to the paper in evidence on the ground that it is a paper prepared by a person not a party litigant to this action and without the knowledge of the complainant, and is not evidence against him.) By MR. BARRY: Rd. Q. Mr. Roberts, there is some memoranda of your own on that paper, is there not? A. There is. Rd. Q. Will you read the portion which is in Mr. Thompson's handwriting and which constituted the entire memoranda at the time it was received with the check? A. I do not know Mr. Thompson's handwriting, but the paper was as follows when handed to me by him:—

"ESTATE OF JAMES SAUL.

"Balance as per accounts filed	$14,927 54
"Dividends received since, not included in "account	650 00
	$15,577 54"

The same witness (Record, page 159) swore:—

× Q. Have you given all the conversation that passed between you and Thompson? A. His words were that he was simply making a payment on account. That is the impression I got. I would not like to use just his language.

The check with which Thompson paid (Record, page 9) was his own check, to the order of the society, upon the Union Trust Company of Philadelphia. It was shown that but for his deposit in the latter, of Holly's check, said check in favor of the society would not have been good. The receipt (Record, page 58) read thus:

NEW YORK, June 19th, 1890.

Received from executors' estate James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred and seventy-seven and fifty-four hundredths.

$15,577.54. GEORGE BLISS,
Treasurer.
Per E. WALTER ROBERTS,
Ass't Treasurer.

No release was given by the society.

Holly waited for a few weeks, supposing that his money had been properly applied, and that after the deed of the premises he had bought had been recorded, it would be delivered to him. On or about the 10th of July, 1890, Thompson left Philadelphia, to which he never returned, and in the depot at Jersey City attempted to commit suicide. (Record, page 42.)

An assignment for the benefit of creditors was made to his son, Henry C. Thompson, Jr.

Holly was unable, after he learned of Thompson's attempted suicide and flight, to obtain any information concerning the parties who had received his money. Whilst in this state of ignorance, he caused an attachment to be issued on the seventeenth day of July, 1890, under what is known as the Fraudulent Attachment Act of Pennsylvania, in which he swore that he had given the sum of $12,000 (Record, page 127) to Thompson to obtain for him a conveyance of the premises therein described in fee simple; that Thompson had fraudulently appropriated the money to his own use by causing the check to be deposited to his own credit in his own individual bank account, and thereafter by drawing out the same; that Thompson had fraudulently absconded from the city and had fraudulently disposed of his (Holly's) money with intent to defraud the latter. Later, this attachment, in 1894, was discontinued. Nothing was ever received thereunder.

On the 17th July, 1890, (Record, page 17), Holly, through his attorney, notified the society of all the circumstances connected with the use of his check by Thompson in settlement of the legacy with it.

Judge Wheeler, in the Circuit Court (Record, page 181), found:—

> Henry C. Thompson was a lawyer and real estate agent in Philadelphia, and was an executor of the estate of James Saul, of Philadelphia, and had in his hands as such about $15,000, devised and decreed to the defendant, of New York. The plaintiff gave him a check for $12,000, and a receipt for $200 advanced, to pay for a house which the

plaintiff had bargained for. He immediately deposited the check in another bank, where he had about $4000 more, gave his check on that bank to the defendant for $15,577.54, and took a receipt as "from executor's estate "James Saul" for that amount, without further specification. When the plaintiff learned where his money had gone to he demanded it of the defendant, and brought this suit to reach it. * * *

Thompson had with the plaintiff's check of $12,000 an apparent credit in the Union Trust Company of $17.158,60, and drew one check of forty-two dollars and another of fifty dollars on the same day that he drew the check for the defendant, but whether either or both before or after that one does not appear, but if after, he had an apparent credit not drawn against of $17,066.60, which would leave $1489.06 after that check of $15.577.54 was drawn, and which might as well be a part of the plaintiff's as of any other money, and that a[illegible] of other money as well drawn against as the plaintiff's, [illegible]t, if all was so, the check must have been drawn against at least $10,326.94 of the plaintiff's money. Afterwards but $104.35 was deposited and a check of $507.58 was drawn, and with these two checks of forty-two dollars and fifty dollars paid before the check to defendant was paid, and after that was paid a balance of $885.35 was left to the credit of Thompson. These checks may as well have been paid from, and this balance as well left of, the plaintiff's as any other money, and so reckoning them all, there still remains $10,028.82 of the money that went to the defendant, which came directly from, and belonged to the plaintiff. This tracing accords to the defendant full advantage of the fact that neither money itself nor bank credit for money has any earmarks, and puts upon the plaintiff the burden of showing what of his money must actually have come into the hands of the defendant by allowing for all that from want of earmarks or confusion of credits may have in any manner gone elsewhere."

The Circuit Court of Appeals for the Second Circuit, through Judge Wallace (Record, page 194), found:—

The complainant employed Thompson as an attorney and conveyancer about the purchase of certain real estate, and June 19th, 1890, delivered to him a check for $12,000 with instructions to apply the proceeds to the payment

of the purchase money. Instead of doing so, Thompson used the check as a credit item in his account with the Union Trust Company, and misappropriated the proceeds by checks drawn by him on the trust company. Among these check was one dated June 20th, 1890, for $15,577, payable to the order of the missionary society.

Thompson was one of the executors of the estate of James Saul, under whose will the missionary society was a legatee. A decree of the probate court having jurisdiction in the premises had been entered in November, 1889, settling the accounts of the executors and ordering payment of the legacy. Thompson's co-executor was a clergyman, and had left the administration of the estate and the control of the funds exclusively to Thompson; and the missionary society was cognizant of the facts. In the spring of 1890 the missionary society became urgent for the payment of the legacy, wrote several letters to Thompson about it, and also wrote to his co-executor. The latter informed the missionary society in substance that the delay in paying the legacy was solely attributable to Thompson's dilatory disposition. His patience finally seems to have become exhausted, and he insisted that Thompson should produce the securities of the estate for his examination, and fixed a day for that purpose. On that day, before the time appointed, he received a note from Thompson stating that he was going to New York to settle with the missionary society. The next day Thompson called at the office of the missionary society and delivered to its treasurer the check for $15,577, the amount being the sum due as principal and interest upon the legacy. The missionary society accepted the check in payment, receipted for the amount to the executors, and shortly thereafter collected the check. According to the finding of the court below this check was to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from the check of the complainant. The court below decreed against the missionary society for that amount in favor of the complainant.

Judge Wheeler entered a decree in favor of the plaintiff for the sum of $10,028.82, with interest, because of his having found that the money paid to the society belonged to Holly, and that no new transaction had arisen between the society and Thompson after the crediting of the check.

16349

The specifications of error relied on are as follows:—

1. The learned Circuit Court of Appeals erred in decreeing that the decree of the Circuit Court, which was in the words following, should be reversed:

"Adjudged and decreed that the complainant, James Holly, do recover of the respondent, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America, the sum of $\$10{,}028\frac{82}{100}$, with $\$4{,}641\frac{62}{100}$ interest thereon from the nineteenth day of July, 1890, amounting to $\$14{,}670\frac{44}{100}$, together with costs."

2. The learned Circuit Court of Appeals erred in remanding the cause to the Circuit Court with directions to dismiss the bill with costs.

16350

The Circuit Court of Appeals reversed his decree and ordered the bill to be dismissed because of a principle thus stated (Record, page 196):—

> He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently or acquires the commercial paper before its maturity and without notice of any infirmity, has a perfect title which cannot be subordinated to the equities of any third person.

ARGUMENT FOR APPELLANT.

In view of our claim that the transaction connected with the payments to the society of Thompson's check was not one in the course of business, that no value was given and that no debt was paid therewith, we have stated very fully the facts, practically undisputed, of the case. Before entering upon the argument of what we deem to be the vital point, we will briefly advert to a few matters argued by the appellee in the lower court, but not there accepted as of importance.

It was claimed that by virtue of the proceeding in fraudulent attachment, Holly had elected to treat Thompson as his debtor. The purpose of this proceeding, however, was to attach any property of Thompson's which could be seized by the Sheriff. It rested upon an affidavit which disclosed the fraud Thompson had committed, but abandoned no rights possessed by the appellant. At the time the attachment was taken out, Holly did not know where his money had gone. Under the laws of Pennsylvania the fraud perpetrated upon him gave him a right to recoup himself out of any property of Thompson he could find. The attempt so to recoup, especially in view of the fact that all of his money had not been used by Thompson, abandoned neither his right to his money, nor to follow it wherever it could be found.

The appellee was not, and could not be misled, because on the seventeenth day of July, 1890, as soon as Holly learned it had received a part of his money, it was advised of the fact and was asked to make return thereof.

There was no element of waiver or of election in the unsuccessful effort made by Holly to indemnify himself out of Thompson's property, against the consequence of the fraud the latter had perpetrated. The discontinuance of the abortive proceedings put an end to them and to any possible sequence thereof. Under any circumstances, the attachment must have failed, as there had been a prior assignment for the benefit of creditors by Thompson.

The doctrine of a conclusive election of one of several remedies by personal action, rests on an equitable estoppel, but at any time previous to an adjudication the plaintiff may discontinue the first action and proceed with the second.

Johnson *vs.* Frew, 33 Hun. (N. Y.), 193.

> A vendor of goods, the sale and delivery of which was induced by fraud on the part of the vendee, does not by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion; nor is the effort a defense to an action to recover possession against one in whose hands a part is found.

Powers *vs.* Benedict, 88 N. Y., 605.

> An action by a vendor against a fraudulent vendee for the price of goods, if discontinued before judgment, does not prevent an action of trover against a purchaser thereof.

See opinion by Smith, J., in Equitable Co-operative Foundry Co. *vs.* Hersee, 33 Hun., 169.

In Loeb *vs.* Willis, 100 N. Y., 231, 235, citing Bigelow on Estoppel, it is said:—

> By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been. If a suit be discontinued at any stage, * * * it is not an estoppel or bar in any sense.

In Webb *vs.* Buckalew, 82 N. Y., 555, citing Carlisle *vs.* McCall, 1 Hilt., 399; Audubon *vs.* Excelsior Ins. Co., 27 N. Y., 216, it is said:—

> Where the litigation has ended in a discontinuance, * * * so that an actual decision on the merits has not been reached, * * * the proceedings have no conclusive character and cannot operate as a bar.

In Lloyd *vs.* Brewster, 4 Paige Ch., 537, cited by appellants, the syllabus reads thus:—

> If a vendor who has been defrauded in the sale of his goods proceeds *to judgment* against the vendee upon the contract of sale after he is apprised of the fraud, his election is determined.

In Mattlage *vs.* Poole, 15 Hun. (N. Y.), 556, an action was brought against both an agent and his undisclosed principal for goods sold to the agent and used by the principal. It was held that so long as no judgment was entered, the plaintiff's act in suing both did not constitute an election to hold the principal and to discharge the agent.

In Bach *vs.* Tuch, 47 Hun. (N. Y.), 536, an action was commenced by attachment to recover the price of goods. Afterwards an action was instituted for the recovery of the goods on the ground that they had been obtained by false representation. *Held*, that the commencement by attachment did not preclude the subsequent action, it not appearing that the attachment was begun with the knowledge of the falsity of the representation.

In Conrow *vs.* Little, 41 Hun. (N. Y.), 395, A. obtained plaintiff's goods by means of a forged note. When plaintiff learned of the forgery he sued A. and obtained an attachment. Then, learning that A. had transferred the goods to B., plaintiff discontinued and sued B. It was held that the action against B. was maintainable.

In Hays *vs.* Midas, 39 Hun. (N. Y.), 460, A. was induced by B.'s false and fraudulent representations to sell goods to him. A. began suit on contract and attached the goods. Fifteen other attachments preceded A.'s. A. discontinued

and began a replevin suit to recover the goods. There was no evidence that when A. began his attachment suit he knew of the fraud. It was held he could maintain his replevin suit.

In Fowler *vs.* Bowery Savings Bank, 113 N. Y., 450, 455, W. deposited money with the defendant savings bank in trust for his wife E. The pass book read: "In account with W. "for E." Afterwards both W. and E. died, and plaintiff, E.'s executor, demanded the deposit of defendant. W.'s executor presented the pass book and received the deposit. *Held*, that plaintiff, by suing W.'s executor for the amount of the deposit, ratified the payment to him, and having then exercised his election, could not afterward maintain an action therefor against the bank. Earle, J., said:—

> If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being based upon the theory of a wrongful disposition of his property.

See also Nat. Bank *vs.* City Bank, 103 U. S., 668.

Another claim in the court below was to the effect that there was no competent evidence to show that any of Holly's money went into the possession of the missionary society. This claim rested upon an assertion that the books of Thompson as produced and offered in evidence were, as regarded the society, hearsay, and therefore incompetent and inadmissible.

The books offered in evidence were those which Thompson had kept to show his dealings with the trust. The findings of the Circuit Court and of the Circuit Court of Appeals are conclusive as to the fact that Holly's money, to the extent of $10,028.82, went directly to the society. Holly's check for $12,000, without the knowledge of Holly, went, on the 19th June, 1890, to Thompson's individual credit in the Union Trust Company. Without use of at least $10,028.82 of the

proceeds thereof, the check by Thompson upon the Union Trust Company would not have been good. On the 19th June, 1890, Thompson's check on the Union Trust Company was delivered to the society. It would be a waste of time to discuss a question of fact conclusively established in favor of the appellant by the Circuit Court and by the Circuit Court of Appeals.

Another claim was set up in the court below, to the effect that the missionary society had paid out all the moneys it received on the nineteenth day of June, 1890, antecedently to the notice given to it by Holly on the seventeenth day of July, 1890. It appeared, however, that independently of the amount received from Thompson, there had stood to the credit of the society in its bank, at all times between the nineteenth day of June and the seventeenth day of July, 1890, a sum derived from independent sources in excess of $18,000.

If the fact had been otherwise, however, it would have been immaterial. The society could not excuse itself for the use of Holly's money by saying it had expended it in and about its purposes.

On the twentieth day of June, 1890, there was a balance to the credit of the society in the National Bank of New York of $43,569.83. On the same day Thompson's check was deposited, with a small additional amount, and at the end of the day the balance in bank was $60,110.09. Between the twentieth day of June and the eighteenth day of July, 1890, both inclusive, the society had received and deposited additional sums of money amounting to $45,265.81, making a total, including the amount on deposit on the twentieth day of June, of $105,375.90. Checks had been drawn during this interval of time to the amount of $74,663.96, which left a balance in bank to the credit of defendants on deposit on the nineteenth day of July, 1890, the day after receiving Holly's notice, of $30,711.93. At no time during the interval was the balance to the credit of the society less than the sum we have named.

Having made these preliminary observations, we will deal with the vital question raised by this record.

If the decree of the Circuit Court of Appeals be not reversed, a great hardship will be inflicted upon Holly, the appellant, who will have involuntarily contributed, to an extent far beyond either his inclination or his means, to missionary work, and the appellee, entitled as a residuary legatee to an estate which did not exist, will be allowed to retain his money, received by it in the belief that such money was an asset of said estate. This retention will be permitted despite the fact that no consideration of any sort or kind was given for Holly's money in the way of discharge of a debt, or otherwise. It is not pretended, and it could not be pretended, that by reason of Thompson's payment the society was prevented from otherwise collecting from him the misappropriated funds of the estate. Within a month after the transaction Thompson was a fugitive, attempting suicide, leaving behind him assets worth about $2500 with which to pay an indebtedness of over $100,000.

The case, in brief, presents this aspect: Thompson, a defaulting trustee, replaced the amount he had misappropriated, by converting money entrusted to him by a client for a specific purpose, and by paying to the *cestui que trust* the amount thus replaced. In this transaction Thompson, as trustee, acted on behalf of the trust estate. All interested in the trust estate, including the society, took the benefit of the wrongful act of their trustee, charged with the knowledge he possessed. We formulate, in the shape of a proposition, the point we make.

The executors of Saul paid the moneys of Holly to the missionary society, which gave no value therefor. Holly is therefore entitled to demand a return of his moneys.

Even in the case of a payment of his debt by an insolvent with stolen or misappropriated moneys or negotiable paper, a great hardship is done to the real owner of the money or negotiable paper stolen or misappropriated, without any neglect on his part.

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Where a man whose name is upon commercial paper, indorses or assigns to another, though it may also be a hardship upon him if, subsequently, he is compelled to pay what he made or indorsed, in favor of those relying innocently upon his act, yet he suffers from the result of his own action. He has not much moral right, as against a third person receiving the paper upon the faith of his execution, indorsement or assignment, to escape from the legal consequences of appearances created by himself. In defending against those who ask him to respond to his making or indorsing of commercial paper, he is compelled to admit that upon the face of the paper he is responsible, and is obliged to ask to be relieved because of some fraud perpetrated by another to whom he had furnished the means of doing injury. As against a third person, ignorant of the fraud or the misuse, there is every reason why he whose act brought about the opportunity to deceive, shall bear the ill results.

An assignor seeking to escape from the effect of his assignment, conceding that upon the face of the instrument he is liable, asks that an innocent person who relied upon his act shall suffer, rather than that he shall do so.

The principal, however, who hands money to his agent to to be delivered upon a specific account to a designated person, does nothing which either vests, or appears to vest, a title in his agent. The receiver of such money, if the same be misappropriated by the agent, can appeal to no act of the principal which, upon its face, appeared to convey the title. Under such circumstances, it is a hardship upon the principal whose money is misappropriated, to allow such receiver to profit by the misappropriation. Such profit should only be permitted because of some imperative necessity of business or commerce. Two things are absolutely essential under either exigency, to enable the receiver to retain misappropriated property, viz., ignorance of the fact of misappropriation and the giving of value. It does not follow that the full value must be given, though any considerable inadequacy of value would justify a finding of *mala fides*.

The *bona fides* of the person receiving the misappropriated

property and the giving of value, are not sufficient to entitle him to retain as against the real owner, all kinds of property, but only certain kinds, such as money and negotiable securities.

Courts, finding themselves compelled either to hamper business transactions by imposing upon innocent purchasers for value, taking negotiable securities or money in the ordinary course of business, a liability to respond to the real owner or to promote such transactions even at the expense of depriving the owner of his title, have determined it to be essential to allow business to be done with safety under ordinary circumstances, even though the innocent owner must suffer.

Whether the payment of an antecedent debt does, or does not, constitute the giving of value, is a question concerning which courts have differed; but this court has long ago settled the Federal law which governs the subject. It has, however, required that the transaction which will give immunity must be one in the ordinary course of business and must amount either to payment or collateral securing such debt.

Under the law as settled by this court, even in the case of misuse of negotiable securities in paying, or in collaterally securing, an antecedent debt, the necessary conditions, prerequisites to a divestiture of the title of the real owner, are (1) the existence of a debt, and (2) the paying, or collaterally securing, the same. If there be no debt, there is, of course, no foundation for the divestiture. If, though there be a debt, it is not paid, or collaterally secured, the creditor can not retain the property of another. Whilst some of the courts have held that the creditor does not necessarily injure his position by the acceptance of the misused negotiable securities from an insolvent debtor, this court has held that merely by reason of the fact of accepting payment or accepting collateral security, the position of the creditor might have been affected. It therefore assumes that it was.

In the present case, we need not bother with any question of collateral security, because none was offered. We deal simply with the question of whether or not there was a payment.

Was there a debt owing by the estate of Saul to the missionary society? If aye, was such debt paid with Holly's money? We contend that the transaction was not in the ordinary course of business; that no debt existed; and that there was no payment, or attempt to pay, a debt owing to the missionary society by any person who stood towards it in the relation of a debtor. In order that what is said under this head may be read in connection with the facts, we made the elaborate statement constituting the first part of our brief.

(*a.*) THE ESTATE OF SAUL WAS NOT A DEBTOR TO THE MISSIONARY SOCIETY.

Saul bequeathed his residuary estate to the society. It consisted of the securities we have specified. The residuary legatee was entitled to nothing saving that which would remain after the administration of the estate and after the payment of its debts and expenses. Thompson, anterior to the time of filing the account of the executors in the Orphans' Court of Philadelphia, had sold the securities and had misappropriated the proceeds. No estate was left. The other executor and the residuary legatee, were ignorant of the fact that the estate had been wasted. They supposed the securities still remained on hand. The account of the executors was filed in which it was stated that the estate, as per the original inventory, was in hand (Record, page 179), less certain amounts which had been paid thereout. The Orphans' Court adjudicated the account upon the mistaken idea that the securities still remained with the executors, and that the estate was intact. It ascertained the amount of the residuary estate as it supposed the same to exist, and awarded the same to the residuary legatee. After this adjudication, Thompson's co-executor supposed the securities still remained in hand, and so assured the residuary legatee. Co-executor and legatee were under the impression Thompson was dilatory in delivering the securities that had been awarded, not that they had been sold. Thompson, after he had obtained possession of Holly's money, went to New York and handed his personal check, drawn against the latter, in settlement of the award. The receipt given was to the

executors of the estate for what was then supposed, by the officers of the society, to come from and to constitute the estate. The society did not know Holly's money had been used. It supposed the estate consisted of securities. No explanation was asked of the fact that Thompson delivered, not the securities, but the value thereof. We are bound to presume that knowing as it did that the executors could sell the securities, the officers of the society supposed they had done this, and that they were delivering to them the proceeds of sale of securities which belonged to the estate. By reason of his embezzlement, Thompson and his co-executor might have been held responsible to the estate, by reason of the fraud of the one and the negligence of the other, for the loss. The remedy, however, which would have been open to the society in case it had been informed of the embezzlement and loss, would not have been a direct one. There had been no decree finding the fact of embezzlement or of loss, nor one ordering Thompson and Watson to pay anything individually to the society. In the belief that the estate was intact, the Orphans' Court had directed the executors to pay the estate to the owner, viz., the residuary legatee. The executors delivered to the latter, not the estate which had been awarded to it, which was really non-existent, but the money of Holly.

The missionary society accepted the check paid to it by Thompson under the mistaken idea that it represented the proceeds of sale, by the executors, of the securities to which it was entitled. As we have said, the estate owed it nothing and the executors were not supposed to pay, and did not pretend to pay, their own funds, in liquidation of an indebtedness neither known to exist nor taken into consideration nor dealt with.

Saul, by his will, did precisely what he would have accomplished in his lifetime by a donation. He gave his residuary estate, consisting of certain securities, to the society. No value, of course, was paid by it therefor. The executors were practically in the position in which a messenger would have been placed had Saul in his lifetime intrusted the securities to him, to be handed to the society. In the latter case, if the

messenger had lost or misappropriated the bonds and had delivered in place thereof, the bonds or money of some other person, the society could not have retained such bonds or money as against the rightful owners, inasmuch as it would have given no value therefor.

Would it be contended, if the Orphans' Court had specifically awarded, as constituting Saul's residuary estate, certain designated securities, that if Thompson had handed to the society certain other negotiable securities of like value, belonging to Holly, the society could have retained the latter? In what respect is the case before the court different from the one we have put? The estate consisted of securities. The thing handed to the society was supposed by it to be money derived from the sale thereof, but, in reality, it was money derived from Holly.

The provisions of the Pennsylvania statutes upon the subject of distribution of the estates of decedents, are to be found in 1 Pepper & Lewis Digest, 1521–2. They are embodied in the Act of 24th February, 1834, and run thus:—

> No administrator shall be compelled to make distribution of the goods of an intestate until one year be fully expired from the granting of the administration of the estate. Whenever distribution as aforesaid shall be required by any person interested, the administrator shall present, to the Orphans' Court having jurisdiction of his accounts, a statement of all demands against the estate, which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue under the direction of the Orphans' Court aforesaid. * * * Before any person shall be entitled to receive any share in the distribution, as aforesaid, he shall give sufficient real or personal security, to be approved of by the Orphans' Court, having jurisdiction, as aforesaid, in such sum and form as the said court shall direct, with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or de-

mand, and of the costs and charges attending the recovery of the same; but if the person or persons entitled to receive the same, is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans' Court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the Orphans' Court on application, shall order it to be paid to the person or persons entitled to it. Executors after one year elapsed from the granting of the administration of the estate, upon the requisition of any residuary legatee, or any other person interested, shall pay and deliver, under the direction of the Orphans' Court having jurisdiction of their accounts, all such legacies as are due and payable by them, or a proportionate part thereof, first deducting all demands against the estate and such further sums as may be necessary to pay the interest and costs of such as are disputable or in dispute; and if there shall be a residue distributable under the intestate laws of this Commonwealth, they shall also distribute the same; and the proceedings in any such case shall, in all respects, whether of security or otherwise, be the same as are hereinbefore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will permit.

The Rules of the Orphans' Court of Philadelphia County, *inter alia*, provide:—

When an account is called for audit, there shall be handed to the auditing judge, to be annexed to the adjudication, a statement or petition, verified by affidavit, setting forth the date of decedent's death, the names and relationship of the persons who claim a share in the distribution and the manner in which their interest arises. * * * After a judge of the court shall have filed in the office of the clerk his adjudication, showing the adjustment and settlement of an account, and a decree of distribution when necessary, any parties excepting to the same must file their exceptions with the clerk and furnish a copy of the same to the judge who audited the account, at any time on or before the third Saturday following. The argument upon such exceptions will be heard by the court, when sitting to hear cases on the argument list. If the exceptions are not filed within the time limited, the adjudication will become absolute. * * *

> All applications to enforce a decree or adjudication for the payment of costs or any other sum of money, or for the delivery of any goods, chattels or other property of an estate, by an executor, administrator, guardian or trustee, shall be by petition of the person or persons entitled to the same, briefly setting forth the facts upon which such application is based. If the same be satisfactory to the court, a peremptory order to pay or transfer, assign or deliver, as the case may be, will be granted; a certified copy of which must be served personally upon the respondent at least ten days prior to the day named in the order. And if the order of the court be not complied with on or before the day so named, upon proof of personal service of the order, an attachment will, upon petition setting forth the necessary facts, be awarded.

It will be observed that the duty of the executors of an estate in Pennsylvania, after the completion of the administration, is to distribute, to residuary legatees, if there be such, the amount of the residuary estate. The adjudication by the Orphans' Court of the accounts of such executors, amounts to a decree ordering the delivery of the estate to the residuary legatees. Under the situation as it was supposed to exist when Thompson handed Holly's money to the missionary society, it had been decreed that he should deliver to the latter, not his own estate, nor that of Watson, but that of Saul. This estate was what he was supposed to deliver, for which a receipt was given. There was no decree that either executor should pay anything personally. Their relation under the decree was not that of debtors, but of trustees, bound to deliver the trust estate, donated by Saul, to the *cestui que trust*. The missionary society was a volunteer entitled to the estate thus donated. The executors were the instruments of administration and of distribution. What was done by Thompson was supposed by the recipient to constitute a delivery to the donee of the estate donated.

(*b*.) IT WAS FROM THE ESTATE OF SAUL THE MONEY RECEIVED BY THE SOCIETY, WAS ASSERTED TO BE PAID.

The receipt which was given was to the executors of the estate, not to the individuals. It was given for what purported to have come from the estate and to be a part thereof.

(*c.*) THE MONEY HANDED BY THOMPSON TO THE MISSIONARY SOCIETY WAS NOT, UNDER ANY ASPECT, THE PAYMENT OF A DEBT.

We have already endeavored to show there was no debt owing by the estate, and therefore it follows, if we are right in our contention, there could have been no payment of a debt. If it be claimed that the society would have had the right to proceed against the defaulting executors, as individuals, because they had failed to distribute the estate, it is sufficient to say, by way of reply, that no such right was asserted, and there was no pretense that Thompson was endeavoring to settle his liability as a defaulter. No one, saving Thompson, knew there had been any default. Everybody else supposed the estate was intact.

It is not necessary to consider what the right of the missionary society in the way of retention of Holly's money, would have been, if Thompson had stated to them he was in default, and had agreed to meet his liability by payment with his check. Had he done this, it might with some slight plausibility have claimed he had established a debtor relation and had paid his liability.

The receipt given to him shows the understanding of the parties as to what was done. It runs thus (Record, page 58):—

NEW YORK, June 19th, 1890.

Received from Executors' Estate James Saul, late of Philadelphia, Pennsylvania, Fifteen thousand, Five hundred and seventy-seven Dollars and Fifty-four hundredths. $15,577.54

GEORGE BLISS,
Treasurer.
Per E. WALTER ROBERTS,
Ass't. Treasurer.

No release was given. The liability of Thompson to make good his default remained, after this payment, precisely as it existed antecedently thereto. It was not in the least affected or intended to be affected.

Thompson stood towards the missionary society in two relations: (1) that of an executor holding an estate, subject to

the duty of delivery of the same to the owner, and (2) that of an individual, bound in case of his inability to deliver the same by reason of his default, to respond to those interested. It was with him as a trustee alone the society dealt. Immediately after the giving of the receipt, upon learning the estate had not been really delivered to it, proceedings could have been taken against the executors as well as against the individuals.

Where, in the ordinary course of business, a debt is paid, the creditor has discharged his claim and has no right of action against his former debtor, until the transaction involved in the payment and release is canceled. Had the missionary society learned, subsequently to the giving by it of its receipt, that the executors had made waste of the assets of the estate, they could have proceeded at once to enforce whatever individual liability existed, because, in ignorance that there had been any such, they had not professed to give, and had not given, any discharge thereof.

By reason of an innocent mistake on the part of the missionary society, whose officers supposed they were receiving the residuary estate of Saul, the money of Holly came into its possession. For this money it gave no value and canceled no debt.

What was done was analogous to what would have occurred had a negotiable bond, really lost, belonging to the estate of Saul, been decreed to be handed over to the missionary society as residuary legatee, and had the executor delivered to the residuary legatee a negotiable bond belonging to some one else, issued by the same corporation.

This court, solely for the purpose of enabling business to be done without too much danger, has permitted a creditor, receiving from his debtor the negotiable securities of a third person, in payment of the indebtedness of the latter, to retain the same. The transaction we have been considering was not in any sense a business transaction, but was different from those in which the rule has heretofore been applied, and was not one requiring the application of the rule demanded by business exigencies. Why should Holly's money be allowed to be re-

tained by the missionary society because an executor, utterly insolvent, and about to abscond, saw fit to substitute the same for an estate which had been lost? By virtue of its receipt of the money the missionary society was not in any way prejudiced; was induced to give no release of indebtedness, and remained in precisely the same position it occupied antecedently.

In Thompson *vs.* Sioux Falls National Bank, 150 U. S., 231, a Bank, knowing that the county treasurer of the county had not sufficient county funds in his hands to balance his official accounts, consented to give him a fictitious credit in order to enable him to impose upon the county commissioners, who were about to examine his accounts. They accordingly gave him a cashier's check for $16,571.61, which he indorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the check and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the check in another bank in the same place, which bank brought suit against the bank which issued the check to recover upon it.

Held:—

(1.) That the circumstances under which the check was issued were a plain fraud upon the law and also upon the county commissioners;

(2.) That their receipt of it and turning it over to the sureties was a single act, intended to assist the sureties in protecting themselves, and was inconsistent with the idea of releasing them from their obligation.

In Stephens *et al. vs.* Olson, 64 N. W. Rep. 899, the Supreme Court of Minnesota, in defining an "innocent purchaser," used this language:—

> The term, "innocent purchaser," in this statute as meaning a *bona fide* indorsee or bearer, within the law merchant; in other words that, to come within the protection of the statute, a party must have acquired the paper "in the due course of business," or, as sometimes expressed, "according to the usages and customs of "commercial transactions in commercial paper."

In Railroad *vs.* National Bank, 102 U. S., 23, this court, whilst holding that a person receiving negotiable securities might hold the same where delivered in payment of, or as security for, a pre-existing debt, said —

> Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business.

In Wilson *vs.* Smith, 3 Howard, 763, 769, this court said :—

> We think the question certified has been settled by the decision of this court, and that it is unnecessary to go into an examination of the English laws which were cited in the argument. It is admitted that the bill was the property of the plaintiff, and was transmitted to St. John, at Augusta, for collection, and by him transmitted to the defendant, at Savannah, where the drawer resided; and that no consideration was paid for the bill, either by the defendant or St. John. According to the usual course of dealing among merchants, the transmission of the paper to St. John gave him an implied authority to send it for collection to a sub-agent at Savannah, for it could not have been expected by the plaintiff that St. John was to go there in person, either to procure the acceptance of the bill or to receive the money, nor could St. John have so understood it. So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of the Bank of the Metropolis *vs.* The New England Bank, 1 How., 234. In that case, the bills upon which the money had been received by the plaintiff in error, were the property of the New England Bank, and had been placed by it in the hands of of the Commonwealth Bank for collection, and were transmitted by the last-mentioned bank to the Bank of the Metropolis, in Washington, where the bills were payable. And upon referring to the case, it will be seen that the court entertained no doubt of the

right of the New England Bank to maintain the action for money had and received against the Bank of the Metropolis; and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements upon it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established, that whenever, by express agreement between the parties, a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade or the nature of the transaction, the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.

Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John? As this point has not been certified, it is not regularly before the court, yet as it has been fully argued on both sides, and evidently arises in the case, it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.

Upon this part of the case, as well as upon the question certified, we think the case of the Bank of the Metropolis *vs.* The New England Bank decisive against the defendant. It appears from the statement that he made no advances and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now, if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of the Bank of the Metropolis and The New England Bank, it appeared in evidence that there had for a long time been

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mutual dealings between these two banks in the collection of money for each other, and that balances were suffered to remain and credit given upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money, the hazard he ran by the extension of the credit giving him as just and equitable a right to retain as if he had incurred responsibility by an advance of money. The right to retain, in that case, depended upon the fact that credit was given. But in the case at bar this fact is expressly negatived, and there is no ground, therefore, upon which he can retain, according to the principles decided in the case referred to.

In People's Savings Bank *vs.* Bates, 120 U. S., 556, this court said:—

> It is insisted that the principles announced in Swift *vs.* Tyson, 16 Pet., 1, and the Railroad Co. *vs.* National Bank, 102 U. S., 14, sustain the proposition that the bank was a mortgagee in good faith, although the mortgage to it may be held to have been given merely as security for past indebtedness. The general doctrine announced in Smith *vs.* Tyson was that one who becomes the holder of negotiable paper before its maturity, in the usual course of business and in payment of an existing debt, is to be deemed to have received it for a valuable consideration, and is therefore unaffected by any equities existing between antecedent parties. In that case, Mr. Justice Story said that the rule was applicable as well as when the negotiable instrument was received as security for, as when received in payment of, a pre-existing debt. In Railroad Co. *vs.* National Bank it was held, conformably to the recognized usages of the commercial world, that "the transfer before maturity of negotiable "paper as security for an antecedent debt merely, without "other circumstances, if the paper be so indorsed that "the holder becomes a party to the instrument, although "the transfer is without express agreement by the cred-"itor for indulgence, is not an improper use of such "paper, and is as much in the usual course of commer-"cial business as its transfer in payment of such debt. "In either case, the *bona fide* holder is unaffected by

"equities or defenses between prior parties of which he "had no notice." (Page 28.)

Do these principles apply to the case of a chattel mortgage given merely as security for a pre-existing debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance nor come under a binding agreement to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative.

The rules established in the interests of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed in the adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a *bona fide* holder for value before their maturity. Such a result, if desirable, must be attained by legislation, rather than by judicial decisions.

One of the earliest cases in the Federal Courts upon this subject is that of Morse *vs.* Godfrey, 3 Story, 364, 389. It there appeared that one Reed mortgaged to Godfrey all stock in trade and nearly all his real estate. The latter subsequently mortgaged the same property to a bank. In a contest between the bank and the assignee in bankruptcy of Reed, the former claimed to be a *bona fide* purchaser for value without notice of the invalidity, under the bankrupt law, of the mortgages to Godfrey. Mr. Justice Story said :—

"This leads me to remark that the bank does not stand "within the predicament of being a *bona fide* purchaser "for a valuable consideration, without notice, in the sense "of the rule upon this subject. The bank did not pay "any consideration therefor, nor did it surrender any "securities or release any debt due, either from Reed or "Godfrey, to it. The transfer from Godfrey was a simple "collateral security, taken as additional security, for the "old indebtment and liability of the parties to the notes "described in the instrument of transfer. It is true that "as between Godfrey and Reed and the bank, the latter

"was a debtor for value, and the transfer was valid. But "the protection is not given by the rules of law to a "party in such a predicament merely. He must not only "have had no notice, but he must have paid a consideration "at the time of the transfer, either in money or other "property, or by a surrender of existing debts or securi- "ties held for the debts and liabilities.

"But here the bank has merely possessed itself of the "property transferred as auxiliary security for the old "debts and liabilities. It has paid or given no new con- "sideration upon the faith of it. It is, therefore, in truth, "no purchaser for value in the sense of the rule."

In Decan *vs.* Shipper *et al.*, 35 Penna., 239, 243, a case which has been quoted approvingly by this court, it was said:—

It has been long well settled, that a bill of lading, "reg- "ularly, fairly, and for value indorsed to another, will "pass the title" to the goods to the indorsee. Schumacher *vs.* Eby, 12 Harris 521, and the cases there cited.

The question here, however, is not this, but whether a fraudulent consignee or holder of a bill of lading can pass a title to the goods in such bill to a purchaser for value without notice of the fraud? or, in other words, whether he can give title by indorsement of the instrument, when he has none himself? That is the aspect in which we may certainly consider this case, although there might, perhaps, be another in which the *bona fides* of the indorsee is questionable. The holder of the bill of lading procured the grain from the plaintiffs, on the fraudulent representation that he was purchasing it for Alburtis, the indorsee, and that it was to be paid for in cash. Under this false pretense, he procured the delivery to be made, and had it shipped to his own order, and then, by indorsement of the bill, procured an advancement to be made to him by Alburtis. The plaintiffs never sold or parted with their title to him as purchaser, and it was fully shown that he was not authorized to purchase for Alburtis. So that the possession was clearly fraudulent As soon as the plaintiffs discovered this, and before the vessel sailed, they demanded the redelivery of the grain from the master, and on refusal brought this action of trover to recover the value. The master defends on the title of Alburtis, under the indorsement of the bill of lading. Can he successfully do so?

> We think not. The point thus involved has been elaborately investigated in recent English cases, and it has been held that by the assignments of a fraudulent holder, of delivery orders for goods in store (instruments of the same commercial nature as bills of lading), where the possession of the goods was never intended to be passed by the vendor to such holder, no title passed to a party making advancements on the faith of the assignments, although they were taken in good faith: Kingsford *vs.* Merry, 1 Hurl. & Norm., 503, in Exchequer Chamber. So as to a bill of lading: Gurney *vs.* Behrend, 3 Ellis & Bl., 622. The same principle was ruled in Brower *vs.* Peabody, 3 Kern., 121, and in Dows *vs.* Perrin, 2 Smith (Court of Appeals, N. Y.), 325. Such, too, is the elaborate note of the American editors to the case of Lickbarrow *vs.* Mason, 1 Smith's Leading Cases, 751. The reasoning in these cases is so satisfactory that we think the court were right in following them as precedents, and in deciding that the defendant below was not protected by the indorsement of the bill of lading by Bunker to Alburtis.

It will, of course, be conceded that Thompson's relation towards Holly was a fiduciary one, he having been intrusted with money to be used for a specific purpose, without any right to mingle the same with his own money, or in any way to convert the same to his own use, even temporarily. It will also be conceded, and therefore we do not quote authorities to sustain the position, that a *cestui que trust* may follow his money through various forms of mingling and change, and recover the same as against every person not paying value therefor. The principle was conceded by the Circuit Court of Appeals. It is thus stated in 2 Story Eq. Jur., section 1258:—

> The general proposition which is maintained, both at law and in equity upon this subject, is that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him, in right (not being *bona fide* purchasers) any more valid claim in respect to it than they had before such change.

Lord Justice Turner, in Pennell *vs.* Deffell, 4 De G., M. & G., 372 and 388, says:—

> It is, I apprehend, an undoubted principle of this court that, as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.

In Knatchbull *vs.* Hallett, 13 L. R., Ch. D., 696, in which a very elaborate review of the subject is made, it was decided that though money held by a person in a fiduciary character had been paid by him, the person for whom he held the money could follow it.

In Van Allen *vs.* Bank, 52 N. Y., 1, it was held:—

> Where an agent deposits in a bank to his own account the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself, nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In such case, in an action brought by the principal against the bank upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank cannot set up a want of privity. It is a question of title solely.

In Swift *vs.* Williams, 68 Md. Rep., 236, decided in the Maryland Court of Appeals, W. and V. were trustees for the sale of certain real estate. W., being about to go abroad, obtained an order from the court authorizing V. to receive the purchase money from the purchaser, and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting. The purchaser gave V. a check for the purchase money, payable to the order of W. and V., trustees. V. indorsed this check with his own name only as trustee to the Manufacturers' National Bank for deposit, giving the bank

a copy of the court order, and opened an account in that bank in his name as sole trustee, although there was at that time an account in the bank in the name of both trustees. On the same day V. drew a check for a portion of said deposit on said bank, signed by himself alone as trustee, in payment for a debt of a certain company of which he was sole trustee, to one Swift, which debt was in no way connected with the said trust fund, and the check, on reaching the Manufacturers' Bank through the Clearing House, was charged to the said account of V. as sole trustee.

The bank on which the check was drawn which was given to V., and made payable to the order of both trustees by the purchaser of the trust real estate, refused to honor it because indorsed by V. alone. V. thereupon arranged with the Manufacturers' Bank to alter the indorsement by signing W.'s name as trustee, and to change the deposit so as to stand in the names of both trustees. The bank on which the purchaser's check was drawn refused, however, to honor it on such new indorsement, and the purchaser obtained a casiier's check from said bank for the same amount and deposited it in the Manufacturers' Bank to the joint credit of W. and V., trustees, and took up his own check; thereupon V. added the name of W., trustee, per V., trustee, to the check he had theretofore drawn on the Manufacturers' Bank, and it was charged up by that bank against the account in the name of both trustees.

A bill in equity was filed against V., the Manufacturers' Bank and Swift, to whom the amount checked out by V. was paid, to compel the replacement of the trust money which was misappropriated through the check given by V. to S. in payment of a debt which was in no way connected with said trust fund. It was held that the defendant bank equally with the other defendants was bound to see that the trust fund, improperly appropriated through its aid, was made good, and that the question was not one of primary and secondary liability, but whether all who had participated in any degree in bringing about the wrong should not be compelled to see it righted; and further, that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make a

creditor, who is paid from a wrong trust fund, a purchaser without notice.

Per Irving, J.:—

> Swift cannot be regarded a *bona fide* purchaser without notice. He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazy, its trustee. As such creditor he received payment from funds belonging to the Bull estate, and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration in a case of this kind, so as to make the creditor who is paid from wrong funds a purchaser without notice (2 Pomeroy Eq., 622, and authorities cited).

Swift *vs.* Williams, 68 Md., 236, is cited in 2d Pomeroy's Equity (edition of 1892), section 747, note, page 1044, as an authority for the statement in the text that—

> No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser.
>
> Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment, which is void, as where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority * * * and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property by means of such transfer comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by cancelling the fraudulent apparent transfer and by compelling a conveyance or reassignment, even as against the holder who is innocent of wrong. The doctrines of equitable estoppel and of *bona fide* purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.
>
> 2 Pomeroy's Eq., ed. of 1892, section 918, pages 1302–'3, citing Ogilvie *vs.* Jeaffresen, 2d Gifford, 353;
>
> Swan *vs.* N. British, &c., Co., 7 Hurlst & N., 603;
> Taylor *vs.* Railway Co., 4 DeGex & Jones, 559;
> Donaldson *vs.* Gillot, L. R., 3 Equity, 274;
> Barnard *vs.* Campbell, 58 N. Y., 73; S. C., 55 N. Y., 456.

In conclusion, we submit that Thompson's action in the matter of taking Holly's money and appropriating the same for the benefit of his *cestui que trust*, was one for which the latter was responsible. As executor of Saul's estate, Thompson was unable to pay over the same to the residuary legatee because it had been deposited. He therefore appropriated the moneys of Holly, and these, whilst acting as executor of the estate, he paid over to the residuary legatee. The *cestui que trust* cannot profit by the act of the trustee in thus endeavoring to make good a misappropriated trust estate at the expense of an innocent third person.

MATTHEW VERNER SIMPSON,
CEPHAS BRAINERD,
JOHN G. JOHNSON,
For Appellant.

10304

No. Mag. 138

Supreme Court of the United States

Brief of Davies for Opposition

OCTOBER TERM, 1899.

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JAMES H. McKENNEY,
Clerk.

No. 409.

Filed Oct. 14, 1899.

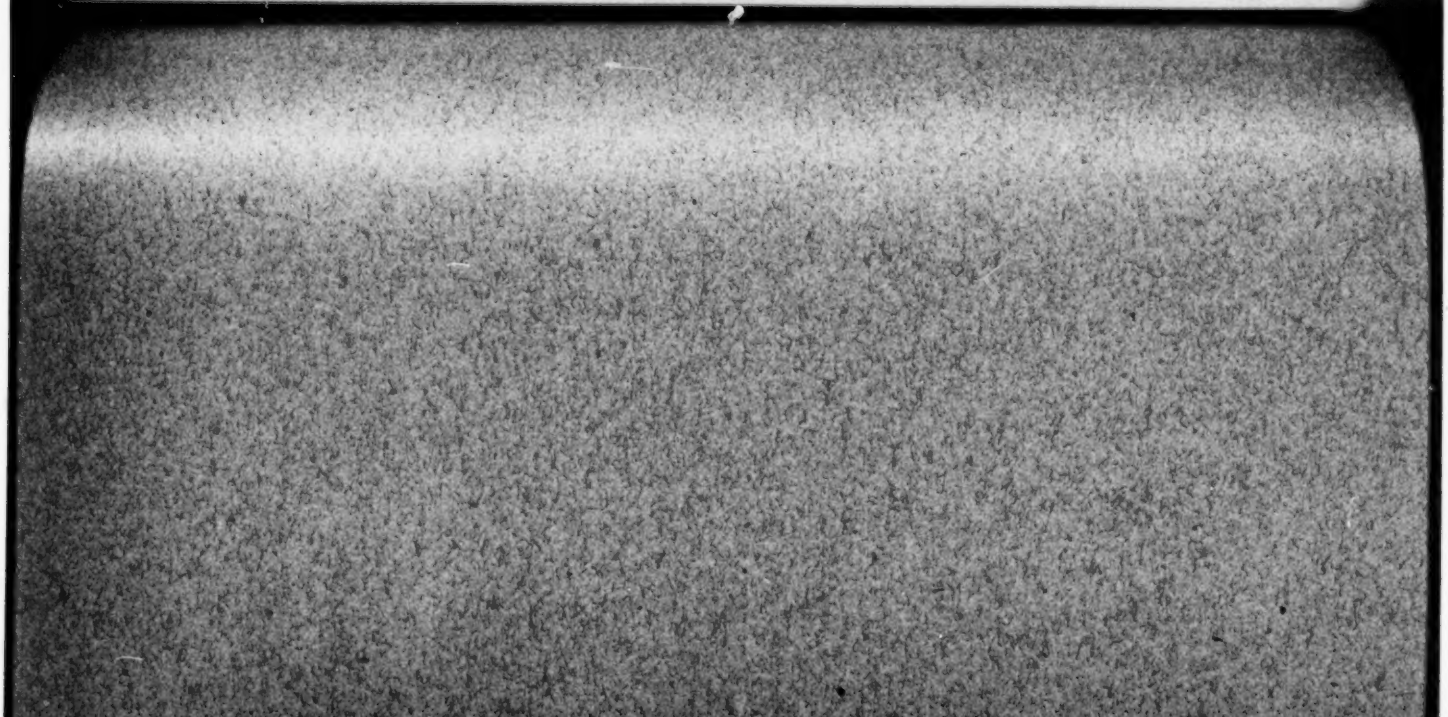
JAMES HOLLY, PETITIONER,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Brief in Opposition to Motion for Petition for Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JULIEN T. DAVIES,
Of Counsel for Respondents.



Supreme Court of the United States,

OCTOBER TERM, 1899.

NUMBER 409.

JAMES HOLLY,
Petitioner,

against

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, and E. WALTER ROBERTS,
Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner fails to show any ground for the writ of certiorari prayed for. Well-defined rules have been laid down relative to such applications, and it is no ordinary case that will be reviewed by this Court after final determination by the United States Circuit Court of Appeals. The rule has been stated by this Court in the following terms: that the power to grant such a writ "is a branch of its jurisdiction which should be exercised sparingly and with great caution and only in cases of peculiar grav-

ity and general importance, or in order to secure uniformity of decision." (*American Construction Co.* vs. *Jacksonville, &c., R'y Co.*, 148 U. S., 372, at 383.)

The Rule Governing such Applications.

The cases in which such a writ will be granted fall, therefore, into two classes:

1. Those of peculiar gravity and general importance; and

2. Those where it is necessary in order to secure uniformity of decision.

The cases falling in the second class are reviewed for the reason that since the nine Circuit Courts of Appeals are of equal dignity and jurisdiction, but are composed of a different personnel, conflicting decisions might readily arise unless such a provision were made. This is illustrated in the opinion in the case of *Smith* vs. *Vulcan Iron Works*, 165 U. S., 518, although even there this Court showed a disposition to restrict the granting of the writ within narrow bounds and refused to issue it on the ground that the admitted conflict of decisions in the different circuits did not materially affect the rights of the parties in the case then at bar.

In the case of *Forsyth v. Hammond*, 166, U. S., 506, litigations were pending between the parties in the Circuit Court of the United States and in the State Court of Indiana and opposite decisions as to their respective rights had been reached by the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. In view of this circumstance this Court considered it a proper case for review.

A precise definition of cases falling within the first class is from the nature of the case impossible; but has been illustrated by the cases brought into this Court.

It is probable that in every litigation the defeated litigant considers the cause as one of peculiar gravity, and the longer he dwells upon its gravity the more likely he is to become convinced that it is also of general importance. Upon no other theory can the present application be accounted for.

The cases in which this Court most readily exercises this power of review by reason of the peculiar gravity of the case and its general importance are those in which the relations of this Government or its citizens to a foreign Government are concerned. The first case in which such an application was granted was of this character. *Lau Ow Bew's Case*, 141 U. S., 583, and 144 U. S., 47. Of similar character was the case of *The Three Friends*, 166 U. S., page 1.

The case of "*The Conqueror*," 166 U.S., 110, was an application by the Attorney General for a writ of certiorari in a case where the interests of the United States were concerned, and such an application would obviously be more readily granted than in a litigation between private parties. An examination of all the instances in which the writ has been allowed during the last two years shows that almost one-third of the cases have been of this character.

The Application of the Rule to the Present Case.

In the case presented by this application the petitioner totally fails to show a case for the action of this Court.

There is no pretense that the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with any decision of that Court for any other circuit. There is, therefore, no ground for reviewing this case in order to secure uniformity of decision.

The petitioner also fails to show that the cause is of peculiar gravity and general importance. It may be conceded that the cause is one of peculiar gravity to the petitioner, and everyone will accord him sympathy for his misfortune and regret that the confidence reposed by him in the agent of his own selection should have been misplaced. The result has proved a costly experience to him, and all will join in condemning the villainy of the embezzler who has brought this loss upon the petitioner.

It is not sufficient, however, that the cause should be one of peculiar gravity to the individual. All litigations may be said to be of that character. It must be of general importance to the community and of peculiar gravity not merely to the individual litigant, but by reason of its general importance.

The questions which the petitioner alleges are presented by this cause, and which he claims should be reviewed by reason of their gravity and general importance, are stated by him as follows:

"FIRST.—Can a party to whom the money of another is paid, if he does not give value therefor, retain the same against the rightful owner where he does nothing more than give a naked receipt therefor? and

"SECOND.—Can a legatee whose legacy is payable out

of funds of the estate, after loss of those funds, retain the moneys of a third person fraudulently misappropriated?"

In the first place, the questions as premised are academic. It is not made to appear, and the opinion of the Circuit Court of Appeals, as well as the record, shows that it is not the fact that either of these questions are involved in the controversy decided by that Court. Under the statutes and the decisions of the Courts of Pennsylvania the relation of debtor and creditor existed between the executor, Thompson, and the legatee, the Missionary Society.

Furthermore, even were these questions actually raised by the facts in the case, we submit that the questions are not of such character as to invoke the intervention of this Court. Were it otherwise, the rule heretofore prescribed by this Court must be wholly recast and restated.

In *Wood's Case*, 143 U. S., 202, the writ was refused, although the questions involved were quite as broad as in the present case and of similar gravity with those now presented.

Submitted herewith are copies of the brief filed by these respondents, upon the argument of the cause in the Circuit Court of Appeals for the Second Circuit, to which we respectfully invite the attention of the Court.

Dated New York, October 10th, 1899.

Respectfully submitted,

JULIEN T. DAVIES,
Of Counsel for the Respondents.

No. 138.

No. 138 of October Term, 1900.

Office Supreme Court U.S.
FILED
DEC 5 1900
JAMES H. McKENNEY,
Clerk.

M. of Davies for Appellees.

IN THE

Supreme Court of the United States.

Filed Dec. 5, 1900.

IN EQUITY.

JAMES HOLLY,

Petitioner and Appellant,

vs.

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA AND E. WALTER ROBERTS.

Record No. 17,523.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLEES.

JULIEN T. DAVIES,
HERBERT BARRY,
Of Counsel for Appellees.

In the Supreme Court of the United States.

JAMES HOLLY,
Petitioner and Appellant,

against

THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA,
Defendant and Respondent,

AND E. WALTER ROBERTS.

BRIEF FOR THE RESPONDENT.

Statement of Facts.

THE COMPLAINANT'S CLAIM.

Holly, the complainant, claims to have traced into the hands of the defendant Society and seeks to recover from it certain moneys that he had paid over to one Henry C. Thompson. These moneys Holly now claims were held by Thompson in a fiduciary capacity, and that they were by him embezzled and paid to the defendant Society in breach of his trust.

THE DEFENSE TO THE ACTION.

This is threefold—apart from failure of proof:

1. That the relation between Thompson and Holly was that of debtor and creditor, and the complainant has failed

to show that any money paid by him to Thompson was impressed with a trust in favor of the complainant.

2. That the moneys received by the defendant Society from Thompson were received for value and without notice of Holly's claim.

3. That the moneys received by the defendant Society were applied and disbursed by it for the specific purposes for which they were received before any notice was received of Holly's claim.

Henry C. Thompson, the man whose misconduct led up to the present suit, is not made a party to the action. The defendant Society has no interest in common with Thompson, and it has nothing to say in excuse, extenuation or palliation of the wrong that Thompson did to Mr. Holly.. It does maintain, however, that the consequences of this wrong should not be visited upon the defendant Society, which is in no way responsible for the misconduct or its results.

THE FACTS AS TO THE MONEY PAID BY HOLLY TO THOMPSON.

On May 14, 1890, the complainant Holly, a resident of Philadelphia, purchased at auction a piece of real estate in that city, the price being $12,300 (p. 66). He paid $200 to the auctioneer upon account and engaged Henry C. Thompson, above referred to, as the lawyer to examine the title and draw the deed (p. 35). The property was bought from the representatives of the estate of Joshua Morgan, deceased (p. 66).

Mr. Holly called upon Mr. Thompson two or three times to see what progress was being made in closing the title.

On the earlier occasions Mr. Thompson told him that certain papers to be signed by some of the grantors had not been executed (p. 35); but with reference to the last occasion, which was on June 19, 1890, Mr. Holly testifies (p. 36):

> "The last time I went to him he told me that the papers were ready; that everything would be right, and that he would have everything settled in a few days: for me to give him my check; I gave him my check; he wrote me a receipt and I left him."

This check was for $12,000, and that it could not be properly designated a trust fund appears from Mr. Holly's further testimony (p. 69):

> "Q. How did you expect Mr. Thompson to pay $12,100, which was the balance then due, out of the $12,000, which you paid him? A. I did not suppose that this was settling the thing. I supposed this was paying him what he asked me, and I would pay the balance afterwards when we were settling the account. That is just what he asked me for, and I gave him a check and he filled it up for that amount.

By the testimony of the Custodian of the Records of the Orphans' Court of Philadelphia County, it appears that on June 12, 1890, a petition was filed for confirmation of the sale by the representatives of the Estate of Joshua Morgan, deceased, to James Holly, and that the decree entered thereon was not made until July 12, 1890 (p. 75). Therefore, the parties were not in a position to close the sale at any time prior to July 12, 1890.

This is important. On June 19, 1890, Holly supplied Thompson with funds in order that the latter might be able to pay the purchase price for some property when the seller should be in a position to deliver good title. Holly admits that Thompson told him that the parties

were not, at that time, ready to close, but would be "in a few days" (p. 36). The moneys were not the exact amount required, nor even sufficient to make up that amount. It would be necessary for Thompson to put his hand into his own pocket to complete the amount. In the interim Thompson intended and was expected to deposit the money in his own bank account—not to open a separate account—and there was obviously no intention nor anticipation on the part of either Holly or Thompson that this specific money should be applied to the purchase.

It must be also borne in mind that Holly had known Thompson for twelve or fifteen years (p. 34); had previously employed him on two or more occasions in a professional capacity (p. 35); and on one of these occasions the mode of conducting the transaction was very similar to that in the present instance, viz: Holly supplied Thompson with a certain amount of funds, and Thompson with his own money made the necessary payments, the transaction actually resulting in Mr. Thompson paying out more money than he had been supplied with (p. 110). "He kept no special account for trust moneys. They all went into his personal account" (p. 47).

It is also an important circumstance that at the time of this transaction Thompson was a prominent member of the Philadelphia Bar (p. 39). He occupied an important and responsible position in the Real Estate Title Insurance and Trust Company of Philadelphia (p. 76), was a stockholder of that Company (pp. 39, 80, 86), and was reputed to be a man of considerable means (pp. 53, 72, 79, 86). In point of fact, Thompson's bank account shows

that subsequent to the transactions here in question he deposited upwards of $10,000 in the same bank account with which Mr. Holly's check was placed (p. 109), and more than $1,000 in a personal account with another bank (p. 47). He was also possessed of real estate in New Jersey, upon which he subsequently made a mortgage of $15,000 (p. 78). He appears to have been assessed upon real estate in Philadelphia, at all events up to shortly prior to these transactions (p. 53), and he had other property, the amount of which was not accurately determined. His son testified: "The mental condition of Mr. Thompson has been such that I have been unable to obtain any information from him" (p. 72).

Had it not been for the discovery by other officers of the Real Estate Title Insurance and Trust Company of certain improper dealings on Thompson's part, and his consequent dismissal from that Company, it is probable that the property which Mr. Holly bought would have been paid for and the loss consequent upon Mr. Thompson's various misconducts would have fallen later upon other confiding clients.

In point of fact, Mr. Thompson appears to have absconded two days before the decree was procured ratifying the sale by the Estate of Joshua Morgan to James Holly (p. 42).

THE INDEBTEDNESS OF THOMPSON TO THE DEFENDANT SOCIETY.

The Right Reverend James Saul, of Philadelphia, died November 16th, 1887; by his Will and Codicils he gave his entire estate to the defendant Society (pp. 54 to 56 inclusive), and appointed as his executors Henry C. Thomp-

son, the lawyer above mentioned, and the Rev. Benjamin Watson, D.D.

It appears that the value of the estate as inventoried was $17,268.03 (p. 179), but there is no competent evidence as to the nature of the property constituting the estate at that time. The memorandum books of Thompson, offered in evidence by the complainant, were incompetent as hearsay, being the unsworn statements of a witness not called, and their unreliabillty being further shown by the fact that the entries were absolutely inconsistent with those of the sworn account passed and approved by the Judge of the Orphans' Court (compare pages 104 and 105, and 179 and 180). Whatever the original form of the assets, it is conclusively established that on November 4th, 1889, the executors filed an account in which they charged themselves with $17,824.92, and claimed credits for $2,025.22, leaving a balance of $15,803.70. On November 5th, 1889, the account was confirmed, and the adjudication of the Court contained the following:

> "Vouchers were produced for the credits claimed in the annexed account, and the distributive balance was shown to be..... $15,803.70
>
> | | | |
> |---|---|---|
> | Less pd. filing and advertising.. | $23.50 | |
> | " " Dr. Robert C. Moon.. | 52.00 | |
> | " " Clerk's costs..... | 15.00 | 90.50 |
> | | | $15,713.20 |
> | Less collateral inheritance tax to be paid to the Register..... | | 785.66 |
> | | | $14,927.54 |
>
> which is awarded to the Domestic and Foreign Missionary Society of the P. E. Church in the United States of North America."

The entire management of the estate of Dr. Saul had been left in the hands of Mr. Thompson, and his dealings with it were unknown either to his co-executor or to the Missionary Society. The Missionary Society made enquiries from time to time as to when they might expect payment of the legacy, but Thompson, being a man of excellent reputation and enjoying the confidence of the community in which he lived, no suspicion was aroused by the delay, particularly since such delays were more usual than otherwise in the experience of the Society (p. 162). In the Spring of 1890 the Society became more urgent (pp. 29–32), and, after considerable correspondence, the co-executor, Dr. Watson, became quite peremptory in his tone to Mr. Thompson. Both Dr. Watson and the Society were under the erroneous impression that the estate consisted largely of securities which had not been converted into money (p. 60), and on June 18th, 1890, Mr. Thompson agreed to exhibit to Dr. Watson such securities on the following day (p. 61). On the following day, however, Thompson wrote that he was going to New York to make settlement of the Missionary Society (p. 58), and on that day he did in fact go to New York and deliver to the defendant Society his check for $15,577.54, stating that it was in part payment of the same legacy.

THE FACTS AS TO THE PAYMENT MADE TO THE DEFENDANT SOCIETY BY THOMPSON.

On June 19, 1890, the executor, Henry C. Thompson, appeared at the office of the defendant Society in New York City, and what took place is described by the witness E. WALTER ROBERTS as follows (p. 158):

"Mr. Thompson simply said, 'I am Mr. Thompson (mentioning his initials). Here is so much on account of the Saul Legacy,' and he made a check with this memorandum and asked me for a receipt on account. I left Mr. Thompson and went into the Secretary's room, and we spoke together. I made out a receipt and handed it to Mr. Thompson, and he went out. * * * The paper was as follows, when handed to me by him:

ESTATE OF JAMES SAUL.

Balance as per accounts filed	$14,927.54
Dividend received since not included in account	650.00
	$15,577.54"

The testimony of Dr. JOSHUA KIMBER is similar in effect (p. 151).

The check was as follows (p. 104):

"$15,577.54. PHILADELPHIA, June 19, 1890.

THE UNION TRUST COMPANY,
Nos. 715, 717, 719 Chestnut Street.

Pay to the order of The Domestic and Foreign Miss. Soc. of the P. E. Church,
Fifteen thousand five hundred seventy-seven 54/100 Dollars.
No. 623. H. C. THOMPSON."

The receipt was as follows (p. 58):

"NEW YORK, June 19, 1890.

Received from Executors Estate of James Saul late of Philadelphia, Pennsylvania, Fifteen thousand five hundred twenty-seven 54/100 Dollars ($15,527.54).

GEORGE BLISS, Treasurer,
per E. WALTER ROBERTS,
Ass't. Treasurer."

The entire innocence with which the Society received this payment is more fully discussed in a subsequent part of this brief.

THE APPLICATION AND EXPENDITURE BY THE SOCIETY OF THE MONEYS RECEIVED FROM THOMPSON.

The legacy from Dr. Saul to the Missionary Society was upon the following terms:

> "Conditioned that the amount thus bequeathed shall be appropriated by said Society in equal proportions of one-third to domestic missions, one-third to foreign missions, and one-third to the benefit of the colored people in the Southern or formerly Slave States, for the support of schools and missions" (p. 54).

Upon receipt of this check from Thompson, the Missionary Society deposited it in their general bank account, where it was collected, and the proceeds were applied in the specific manner designated by Bishop Saul (p. 153). It had all been so expended prior to the receipt of any notice of Holly's claim.

Such notice was first received through a letter from Holly's counsel mailed from Philadelphia on July 17th, 1890 (p. 96), and presumably received on the following day. Thompson's check was deposited on June 20th, and at the opening of business on that day the defendant Society's balance with the bank was $43,569.83 (p. 116). During the period from June 19th, 1890, to July 18th, 1890, the moneys withdrawn by the Society from its account aggregated $88,589.74 (pp. 116–122), being far more than the aggregate of Thompson's check and the balance on hand when it was deposited.

It was also elaborately shown that the amounts expended during this period for the specific purposes designated by Bishop Saul were in each instance in excess of the one-third of the amount received by the Society from

Thompson (Exhibits B, C, D and E, p. 147, and the testimony in connection therewith).

The Society had, therefore, received the money for certain specific purposes, and had applied it to and expended it upon those purposes before receiving any notice of Holly's claim.

FIRST POINT.

The relation between Thompson and Holly was that of debtor and creditor, and the complainant has failed to show that the moneys paid by him to Thompson were impressed with any trust.

It sufficiently appears from the evidence that when the $12,000 check was delivered by Holly to Thompson it was not given with any idea that the money would be deposited in a separate account or otherwise set apart as a trust fund.

Holly and Thompson were not dealing at arm's length; Holly had entire trust and confidence in Thompson (p. 39), and handed over to him the money to be deposited and handled as Thompson should see fit. We do not by any means accede to the unsubstantiated statement to the contrary appearing at page 34 of the appellant's brief.

Although the form of the receipt given by Thompson might create a *prima facie* presumption that the money was to be held as a trust, yet the other facts tend to rebut this presumption. It has been frequently held that the

receipt by an agent of funds that would ordinarily create a relationship of trust will not do so if the parties intend the contrary.

The evidence shows that the transaction between Holly and Thompson was at the time considered by them both as creating a relation of debtor and creditor; and when Holly first learned that Thompson had absconded he naturally proceeded to assert his rights *as a creditor*.

On July 17th, 1890, Holly instituted an action *ex contractu* against Thompson and procured the issuance of an attachment (p. 127). By this action Holly unqualifiedly asserted his claim *as a debt* due from Thompson. A year later, on July 15th, 1891, Holly reiterated this claim and assertion in the declaration filed at that time in the cause (pp. 131–3).

In April, 1894, this attachment suit, being no longer useful to the complainant, was discontinued (see record, pp. 126–137).

We respectfully submit, however, that the complainant, having elected to sue Thompson for the $12,000 as a debt, has conclusively established the facts as to the character of the relationship and is estopped from maintaining this suit against the defendant Missionary Society, which is wholly inconsistent with such facts.

It is frequently the case that upon a given statement of facts a person has an election to institute an action, either *ex contractu* or *ex delicto*, but he cannot concurrently maintain both, even though they be against different defendants.

In this case the complainant is suing the defendant Missionary Society on the theory that it has knowingly

received funds stolen from him. Prior, however, to the institution of this suit the complainant had brought suit against Thompson in the Court of Common Pleas of Philadelphia to recover this same amount as a debt.

It cannot be claimed by the complainant that this election was made without knowledge of all the facts, and that he should not be prejudiced thereby, for not only was it brought, but a year after its institution, and after the bringing of the suit at bar, he filed the declaration in his action in order to keep his action alive. This was done with full knowledge that this action was inconsistent with the further prosecution of this suit, for he afterwards moved this Court for leave to prosecute his attachment suit at Philadelphia without prejudice to this action. This application was denied (p. 97). He then endeavored to escape from the consequences of his election by discontinuing his attachment suit in Philadelphia. In his affidavit to obtain a discontinuance of the Philadelphia action, the complainant swears, "that this deponent is advised by his counsel that the further prosecution of the present attachment proceedings in Pennsylvania is likely to prejudice the prosecution in his claim to recover these moneys from the parties who hold the same in the State of New York" (p. 137). It is thus evident that the complainant was acting all along with full knowledge of his rights, but was making a strenuous endeavour to pursue inconsistent remedies at the same time.

However much this method of proceeding may have appealed to the complainant, it is not regarded with favour by the courts. In *Lloyd* vs. *Brewster*, *4th Paige, Chan., 537*, it was held that the vendor of certain goods, who had

brought suit against the vendee for the purchase money, could not afterwards follow the goods or the proceeds thereof into the hands of a third person on the ground of fraud.

In *Morris* vs. *Rexford*, *18 N. Y., 552*, is the exact converse of the above case; the vendor of goods having replevied the goods from the vendee, was held to be barred from bringing a subsequent action for the purchase money.

The Court there says:

> "These proceedings on the part of the plaintiff amounted plainly to an election between inconsistent remedies, and if the right of election existed, the effect was to confine him to the remedy which he then preferred and adopted, and the vendor of goods, on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute and rely on the responsibility of the vendee, or he may disaffirm and reclaim his property; but he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow other is forever gone. The law tolerates no such absurdity as the seizure of the goods by a person claiming that he has never sold them, and an action by the same person founded on the sale and delivery of the same goods for the recovery of the price. In peculiar circumstances the party may take either one of these courses, but having rightfully made his choice the right to follow the other is extinct and gone."

In *Rodermund* against *Clark*, 46 N. Y., 354, it was held that where one of two joint owners of a sloop sold the entire sloop to a third person without the consent of his co-owner, that co-owner could not, after declining to recognize the sale and retaining possession of the vessel,

bring an action for conversion against his former co-owner.

The Court says:

> "If he actually insisted on keeping the possession of the vessel and refusing to recognize the sale by the defendant, he could not sue the defendant for the conversion. There does not seem to be any doubt that he did so insist. * * * Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. If the remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (Morris *vs.* Rexford, 18 N. Y., 152.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

In *Moller* vs. *Tusker*, 87 N. Y., 166, the Court says:

> "The plaintiffs, upon discovery of the fraud, had a choice of remedies. An action against Valk Brothers for the price according to the terms of sale or replevin of the property, upon the ground that, by reason of the fraud, the contract of sale was void. * * * The plaintiffs manifested their election by bringing this action. After that, the other way of redress was not open to them, for, according to Comyn (Dig. Elect., C. 2), if a man once determines his election, it shall be determined forever, hence they could never successfully assert a claim against the purchaser after the the contract for the election to disaffirm it had been manifested, and to revoke it was not in their power."

In *Fowler* vs. *The Bowery Savings Bank*, 113 N. Y., 450, the plaintiff was entitled to a certain deposit in the defendant Savings Bank. The Savings Bank had, without authority of the plaintiff, paid over the deposit to a third person. The plaintiff having brought an action against the third person, it was held by the Court of

Appeals that he was estopped from bringing an action against the Savings Bank.

The Court says:

> "But if the trustee is bound to pay any money to a beneficiary as a debt due from him to the beneficiary, then if he makes payment to another person, he has not paid the debt, and the money paid is not in fact the property of the beneficiary. In such case the beneficiary may know of the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person receiving the money as his debtor, but he cannot do both. There is in such a case a breach of trust or not, as he may elect, and his election once effectually made is conclusive forever (Comyn, Dig. Elect. C. 2.) If one wrongfully takes and sells personal property not belonging to him the owner has the election to sue him for the proceeds as money had and received to and for his use, and thus ratify the sale, or he may pursue the property and recover it or its value, but he cannot do both and is bound by his election."

It will be noticed from the foregoing opinions that when an election is once made, any act sufficient to show such an election is sufficient to make it conclusive and binding upon the person making the election, as in *Rodermund* vs. *Clark* (*supra*):

> "Any decisive act of a party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

SECOND POINT.

The defendant Society received Thompson's check for $15,577.54 and the proceeds therefrom for value and without notice of the complainant's claim.

SUBDIVISION I.

Payment of an existing indebtedness constitutes a sufficient consideration to support a transfer of negotiable paper and a *a fortiori* a payment.

This proposition is not seriously questioned by the appellant's counsel. His brief suggests limitations and restrictions, but in point of fact the rule is unequivocal and unquestionable.

In *Mayer* vs. *Heidelbach*, 123 N. Y., 332, the Court holds:

> "That the actual payment and absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper and cuts off prior equities" (p. 339);

and the Court, applying this doctrine to the facts in that case, further says:

> "Where the depositor in a bank, having sufficient funds standing to his credit, tenders his check to that bank in payment for negotiable paper which it has for sale, and the bank accepts the check and charges it against the deposit, and files the check as its voucher and delivers over the paper purchased, the holder of that paper is a holder for value, because the antecedent debt is *pro tanto* actually and in fact extinguished."

The Courts of Pennsylvania hold the same doctrine.

Stedman *vs.* Carstairs, 97 Pa. St., 234.

The Federal Courts have gone still further.

In the leading case of *Swift* vs. *Tyson*, 16 Pet., 1, Mr. Justice Story first says, after reviewing the subject, that the English decisions correctly enunciate the rule.

> "They directly establish that a *bona fide* holder taking a negotiable note in payment for or as security for a pre-existing debt is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

And he further says:

> "We have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments."

See also

Railroad Co. *vs.* Nat. Bank, 102 U. S., 14.

SUBDIVISION II.

Thompson was in fact indebted to the defendant Society.

The brief of the learned counsel for the appellant proceeds entirely upon the assumption that no such indebtedness existed. This is a misapprehension of the facts or the law or of both.

Thompson and Dr. Watson, as executors of the will of James Saul, had filed their accounts on September 26th, 1889, in the Orphans' Court of Philadelphia, showing a balance due to the defendant Missionary Society of $14,927.54 (p. 179). This account was confirmed absolutely on November 23d, 1889 (p. 180), and the executors then became jointly and severally liable to the defendant Missionary Society for the entire amount.

The complainant himself went to some trouble to prove that the payment could have been enforced in the Orphans'

Court by an attachment for contempt (p. 72), but this is not the only remedy.

By the filing of the executor's accounts and their confirmation, they became personally liable for the legacy to the defendant Missionary Society, and an action at law could be maintained against them, or either of them, individually as well as in their representative capacity.

Wilson vs. *Wilson*, 3 Binney, 557, is the leading case on this subject. This was an action for money had and received. The plaintiff was the widow and a legatee of one John Wilson, deceased, and the defendant was his executor.

The accounts of the executor had been filed and settled in the Register's office, and thereby a balance of personal estate was found to remain in the hands of the executor after payment of all debts and legacies. The executor claimed this residuum, and this action was brought by the plaintiff to recover her distributive share of it. Judgment was rendered for the plaintiff upon the verdict of a jury, and upon appeal the defendant argued two points, of which one was:

> "That an action for money had and received would not lie against the defendent in his own right, but that it should have been a special action on the case against him as executor."

The Supreme Court, in affirming the judgment, said (p. 559):

> "The plaintiff does not claim by virtue of any demand which she ever had against the *testator;* there is no occasion, therefore, that her judgment should be against the goods of the testator. Although the personal estate came originally to the hands of the defendant *as executor*, yet the money which remains

after the payment of debts, &c., may not improperly be considered as received by him for the use of those persons to whom by law it belongs. Their claim against him is *in his own right*, for withholding the money which he unjustly detains. I am of opinion that the form of action is proper."

This case is cited as authority upon this proposition in

Griffith *vs.* Chew, 8 Sergt. & R., 17, at 32.

Bixler *vs.* Kunkle, 17 Sergt. & R., 298, at 310.

Morrow *vs.* Breuizer, 2 Rawle, 185, at 192.

Foulk *vs.* Brown, 2 Watts, 209, at 213.

Geddes *vs.* Irvine, 5 Pa. St., 508, at 511.

Richardson *vs.* Richardson, 9 Pa. St., 528, at 431.

Pringle *vs.* Pringle 130 Pa. St., 565, at 569.

In *Foulk* vs. *Brown*, 2 Watts, 209 (*supra*), the Court said (at p. 213):

"In *Morrow* vs. *Breuizer*, 2 Rawle, 185, it was decided that *assumpsit* for money had and received would lie against an executor personally for the plaintiff's share of the residuary bequest of personal estate and proceeds of real estate, in conformity with *Wilson* vs. *Wilson*, 3 Binn, 55, in which it was held that assumpsit for money had and received lies against an executor in his individual capacity for a share of personal estate undisposed of by will."

See also, Solliday *vs.* Bissey, 12 Pa. St., 347, at 350.

SUBDIVISION III.

The Missionary Society received the check without notice of the source from which it came.

It is a trite saying that money has no earmark, and that no one is put upon inquiry as to the source from which his

debtor obtains the money with which he pays him. Complainant's bill charged the Society with notice of Thompson's fraud upon him, but except this charge the case is barren of any allegation of such notice, or of any facts which should have put the defendant upon inquiry. The answer of the defendant denies on oath any knowledge or notice, nor were there any circumstances sufficient to put the defendant Missionary Society upon inquiry.

The defendant ROBERTS testified (p. 164):

> "Q. Prior to the time that you received this notice from the plaintiff, Mr. Holly, did you have any knowledge that Thompson had disposed of the property of Dr. Saul's estate improperly?
>
> A. No.
>
> Q. And did you know before that time that Thompson was insolvent?
>
> A. No.
>
> Q. When you received that money from Thompson in June, 1890, did you believe that he was an honest and solvent man?
>
> A. Yes."

Thompson was a man of good standing in the community, who was thought to be an honest man, a reputable lawyer and of undoubted solvency at the time he paid over the money to the defendant Society. His colleagues, the officers of the Real Estate Insurance Company, testified that he was the legal adviser of that company up to the latter part of June or beginning of July, 1890, when they had discovered some irregularities in his proceedings, and they testified that they had no suspicions of his solvency, and had supposed that he was in comfortable circumstances financially up to the time of their discovery (pp. 75–87).

These were the complainant's own witnesses. He him-

self had known Thompson for eleven or twelve years and employed him in prior transactions, and was of opinion that he was honest and solvent. He testified that he had no suspicions of his financial condition; "if I had," he testified, "I wouldn't have given him the check, of course" (p. 39).

Thompson's son, who was called as a witness by the complainant, testified that he had no suspicion of his father's insolvency up to the time of his attempted suicide (p. 71). Another of complainant's witnesses, Dr. Watson, the co-executor of the Saul Estate, testified that at the time Thompson paid the money to the defendant Missionary Society, he had no knowledge that Thompson was paying it with any one else's money, and that prior to that time his character had stood "absolutely well in the community" (p. 60).

If these people, who all lived in the same community with Thompson and were his business associates and relatives, had such a high opinion of his honesty and of his solvency, it certainly cannot be expected that the officers of the defendant Missionary Society here in New York should be expected to be suspicious of his reputation and solvency, and employ a detective agency to ascertain the source from which he derived the money to pay his debts to them.

Nor could it be held that the lapse of time was sufficient to put the Society upon inquiry. His co-executor, Dr. Watson, wrote from time to time that the matter was all right and would be shortly paid, and considering the excellent reputations of the two executors, there was no reason why the defendant Missionary Society should

harass them by any legal proceeding to compel an early payment of the legacy. The defendant, Roberts, the assistant treasurer of the defendant Missionary Society, testified that the defendant Missionary Society received many legacies each year. That of these legacies not all are paid promptly, but that he has frequent occasion to request their payment from executors before the Society receives them. That in fact the greater number of the legacies are paid after delay, but the Society has ultimately, in almost every case, received them (p. 162). Upon the facts it is evident that as to the embezzlement of the assets of the Saul Estate, there was no notice, actual or constructive. It is equally clear that there was no notice of the misapplication of the complainant's money.

Even if the defendants had made every inquiry within their power, they could not have found out any facts which would have informed them as to the source from which Thompson obtained these funds. If they had applied at the trust company upon which the check was drawn, they would have been informed that the trust company could not give any one information concerning their depositors' accounts. Their only other resource would have been to apply to Thompson, and they could do nothing else than rely on his answers as to whence he obtained the money. He might have declined to answer at all, and it is certainly improbable that he would have informed them that he had been guilty of a second act of embezzlement, if, indeed, he had been. From the facts stated in the preceding paragraph, it is evident that the most careful inquiry among Thompson's relatives and busi-

ness associates would have brought out nothing except that Thompson was an honest man of undoubted solvency.

As a matter of fact the evidence clearly shows that the defendant had no knowledge of the embezzlement of the funds of the Saul Estate by Thompson, nor any knowledge which could fairly be said to put any reasonable man upon inquiry, had such inquiry been necessary. But although the facts so distinctly refute the plaintiff's charge, it would not be necessary for the defendant to rely upon this proof.

The complainant strenuously claimed in the Court below that the defendants were chargeable with notice of Thompson's embezzlement of the Saul Estate, and as a corollary, that they are also chargeable with notice that the proceeds of Thompson's check to the Society were fraudulently diverted by him from their proper object. The claim is unsupported in fact and is futile even if the facts could be established. The merits of the case are not at all affected by the question whether or not the defendants had actual notice or were chargeable with constructive notice that Thompson had embezzled the assets of the Saul Estate. Even assuming there had been actual knowledge of such fact, what would have been the duty of the defendant? Obviously to secure payment of the legacy from Thompson individually. This could have been enforced by legal proceedings, but if Thompson voluntarily came forward and made a cash payment in settlement, the defendant Society would have been derelict in its duty if it had not accepted such payment.

Even assuming the defendant to have had notice of the embezzlement of the assets of the Saul Estate, the defendant was charged with no notice that Thompson had com-

mitted any further embezzlement or misappropriation of funds when he settled his indebtedness to the Society. It is not to be presumed that because a man embezzles the proceeds of one estate, that therefore, when he makes restitution he is doing so with funds which he has embezzled elsewhere. The presumption is of innocence, not of guilt.

State Bank *vs.* United States, 114 U. S., 401.

Furthermore, the defendant was under no duty, contractual or otherwise, toward the complainant which put it upon inquiry as to the source from whence Thompson derived the funds with which to pay this legacy. The complainant and the defendant are absolute strangers to each other in the transaction.

If any question be raised as to whether the complainant was charged with notice of the defalcations of Thompson as to the assets of the Saul Estate, the answer is twofold: first, that the question is irrelevant and in legal intendment impertinent; second, that upon the facts it is unequivocally to be answered in the negative.

THIRD POINT.

The defendant Missionary Society, having received Thompson's check for value and without notice, is not liable to refund to the complainant any of the proceeds thereof.

The principle and rule upon which we assert this proposition have been steadily adhered to by the Courts even

where fraud much more gross than that of Thompson was the ground upon which relief was sought.

The general rule is stated by Mr. Justice Harlan, in *Railroad Co* vs. *National Bank*, 102 U. S., pp. 14, 25, as follows:

> "According to the very general concurrence of judicial authority in this country, as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statute regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt, or where it is transferred by endorsement as collateral security for a debt created or a purchase made at the time of the transfer * * * in each of these cases the holder who takes the transferred paper before its maturity, and without notice, actual or otherwise, of any defence thereto, is held to have received it in due course of business, and in the sense of the commercial law becomes a holder for value, entitled to enforce payment without regard to any equity or defence which exists between prior parties to such paper."
>
> Followed in McMurray *vs.* Moran, 134 U. S., 150, at 158.

This rule has been applied and adhered to even in a case where the United States was the party benefitted, it having received a check obtained by fraud, but which was received by it without knowledge of the fraud, in part payment of moneys previously criminally abstracted from the Sub-Treasury.

State Bank vs. *U. S.*, 114 U. S., 401, was a proceeding brought in the Court of Claims to recover the proceeds of a check fraudulently obtained from the plaintiff by a third person, and received by the officers of the Sub-Treasury for value and without notice. One Carter, a broker, by collusion with one Hartwell, disbursing clerk of the Sub-

Treasury of the United States at Boston, had abstracted from the Sub-Treasury a large amount of money, which he had used in stock speculations. As the time for the monthly examination of the funds in the Sub-Treasury approached Carter arranged for the deposit in the Sub-Treasury of funds sufficient to make good the amounts abstracted, the disbursing clerk agreeing that these funds so deposited should be returned on the following day. As a part of this deposit of funds, Carter delivered to Hartwell, as clerk of the Sub-Treasury, a cashier's check for $125,000 drawn by the plaintiff Bank to the order of Carter's firm (Mellen, Ward & Co.) This check was obtained by Carter upon fraudulent statements and representations, and then within fifteen or twenty minutes was delivered by him to Hartwell, as part of the funds to be used in making good the deficiency, Hartwell not knowing the circumstances under which it had been obtained by Carter. The draft was subsequently cashed and the proceeds turned into the Sub-Treasury. The proceeding was brought to recover this sum of $125,000 fraudulently obtained from the State Bank by Carter, and which was directly traced into the possession of the United States.

It was held that the State Bank could not recover, the check having been received by the United States for value and without notice of the fraud.

The Court, in its opinion, distinguished the case from a somewhat similar claim made by the same Bank and growing out of the same transaction which had been the subject of a previous adjudication (United States *vs.* State Bank, 96 U. S., 30). In the previous case the Court held that certain gold certificates were received by Hartwell,

with knowledge that they were the property of the State Bank, and not the property of Carter, and, therefore, the United States did not occupy the position of a holder for value and without notice.

With reference to the later action, the Court, per Mr. Justice Harlan, says:

> "There is no room in the present case for the application of that principle. Apart from his responsibility for the crime committed in using the money of the United States, Carter, representing Mellen, Ward & Co., was under a legal obligation to replace the money abstracted from the Sub-Treasury. Of his purpose to do so Hartwell was informed, but he had no reason to believe that Carter would bring him money or securities which belonged to some one else, and which he could not rightfully deliver in discharge of his indebtedness to the Government. When the draft of $125,000 was delivered by Carter to Hartwell the latter was unaware of the means by which the former had obtained it from Smith the cashier of appellant. It was on its face the property of Mellen, Ward & Co. Upon its receipt by Hartwell for the United States, the Government acquired the same rights in reference to it that any private citizen receiving it in the course of business would have acquired."

In the State of New York the application of the rule is even more fully illustrated.

In *Stevens* vs. *Board of Education*, 79 N. Y., 183, one Gill, who was a member of the Board of Education of the City of Brooklyn, had converted to his own use the money of the Board and so became indebted to it for the amount thus abstracted. In order to procure the means of payment, Gill forged a mortgage upon the land of another and sold it to plaintiff, receiving from him the proceeds and depositing them to his own credit. He then drew a

check for the amount of his debt to the Board of Education, and with it paid that debt in full. The Court held that the plaintiff could not recover the money from the Board of Education. The Court said (page 187):

> "But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions, that the payee of money in due course of business shall not be put upon enquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or chose in action may by enquiry in most cases ascertain the right of the person from whom he takes the title; but it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests a title in the holder as to the third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good between the parties, it is good as to all the world. 'Money' said Lord Mansfield in *Miller* vs. *Race* (4 Burr, 452), above cited, 'shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business.'"

In *Newhall* vs. *Wyatt*, 139 N. Y., 452, a partner applied the funds of his firm to the payment of his individual debts. The Court held that as this creditor received the money innocently, he could not be compelled to account for the money misappropriated by his debtor. The Court

cites and approves *Stephens* vs. *Board of Education* (*supra*), and says:

> "But I think it is equally well settled that the payment of money to a creditor, who receives it in discharge of an existing debt innocently and without knowledge or means of knowledge that the debtor paying had no rightful ownership of the fund, is good and effectual and does not subject the recipient to a recovery by the true owner."

In *Goshen National Bank* vs. *State*, 141 N. Y., 379, the cashier of the plaintiff was also the Treasurer of Orange County. He drew as plaintiff's cashier a draft upon the plaintiff's New York correspondent for the amount of money which he, as County Treasurer, was indebted to the Comptroller of the State, and forwarded it to the Comptroller. The Comptroller collected the draft and credited the plaintiff's cashier with the proceeds. It was held that the Comptroller, having received the draft in good faith, the bank could not recover the proceeds from the State, and this was held in spite of the fact that the County Treasurer's name was signed to the draft as cashier of the plaintiff. The Court says, at page 385:

> "If the cashier, instead of sending this draft, had taken the money directly from the Bank and paid the same to the State in satisfaction for the amount due for taxes, I think no one would contend that the Bank could recover it back from the State on the ground that the act of the cashier in taking the money was a fraud upon it or even a felony, and that the State had parted with no value at the time of the receipt of the money. I do not see that in this respect the case is altered by the interposition of the draft instead of the payment of the money in the first instance. * * * The interposition of the draft makes no difference in principle after it has been paid. It is then the same

> as if the money had been originally paid instead of an order given for its payment. The order having been complied with and the original debt thereby satisfied, the transaction is closed and may not be reopened on this ground."

In *Hatch* vs. *National Bank*, 147 N. Y., 184, the agent of the plaintiff procured a loan upon stock of the plaintiff which he had fraudulently converted. The agent then deposited that money with the defendant Bank, which under a special agreement with the agent, applied the money to the satisfaction of an antecedent debt due it by plaintiff's agent. The Court held that the plaintiff could not recover the proceeds of the stock so converted. The Court said at pages 191, 192:

> "This doctrine goes upon the broad ground that money has no earmark, that in general it cannot be identified as chattels may be, and that to permit in every case of payment of a debt an enquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."
>
> Citing Stevens *vs.* Board of Education, 79 N. Y., 183.

In *Dike* vs. *Drexel*, 11 App. Div., 77 (affirmed upon the opinion below, 155 N. Y., 637), a member of a firm paid over the firm's check to persons who had no claim against the firm. The defendants applied the proceeds of the check on a note held by them and made by the member of the firm; and did not surrender the note,

as it was not fully paid, but merely endorsed upon it a credit for the amount received. It was held that the plaintiff, who was the Receiver of the firm, could not recover the proceeds of the check thus misappropriated. The Court held that the only point put in controversy was whether the defendants who received the check "had knowledge or means of knowledge that it is the property of another than the one paying" (p. 83), and that "the question therefore upon which the decision of this case turns is, whether the form of the checks constituted notice that the funds of the partnership of Field, Lindley, Wiechers & Co. were being used by Field to pay the individual debts of himself and Lindley" (p. 84). After an examination of all the facts, the Court held that there was not sufficient evidence of notice, and that the defendants had innocently received the proceeds of the check for value, and were not liable to return it.

Nassau Bk. vs. *Nat. Bk. of Newburgh*, 159 N. Y., 456.

G. B. Taylor deposited to his account in the Nassau Bank a forged draft for $6,000 on the Chase National Bank. Later the Chase Bank discovered that the draft was forged, and the $6,000 was returned to them by the Nassau Bank.

Meantime Taylor had withdrawn nearly the whole of the $6,000 from the Nassau Bank, $2,400 of it being used to reimburse the National Bank of Newburgh for money which he had stolen from them by forged checks, but of the loss of which they were unaware.

The rather curious circumstance was presented of Taylor

repaying to the Bank of Newburgh moneys which he had misappropriated, but both the embezzlement and the restitution being without the knowledge of that bank. It was held that there was adequate consideration and that the Bank of Newburgh was entitled to retain the moneys.

The Court in its opinion said:

> "It is argued that the mere deposit by Taylor of the money, without the knowledge of, or the acceptance by, his creditor, could not constitute payment within the rule. I am unable to recognize the force of the contention. Taylor was a debtor by reason of his forgeries, as well to those who were injured in their property rights thereby, as to the law for his criminal act, and it is of no conceivable importance, in my opinion, that the existence of the fact of indebtedness should be unknown, at the time when he sought to make reparation by repaying the moneys feloniously taken * * * I think Mr. Justice Cullen, who delivered the opinion at the Appellate Division, admirably expressed it, when he said: 'Where one person defrauds another so skillfully that the party defrauded is ignorant of his loss, and restitution is made so adroitly that it does not disclose the original offense, does any different rule obtain from a case where one confesses his fault and openly makes restitution? We apprehend that there can be no distinction between the two cases, and that the very statement of the question precludes the possibility of but one answer.'"

The same doctrine is established in the State of Pennsylvania.

In *Stedman* vs. *Carstairs*, 97 Pa. St., 234, the defendant was the holder of a worthless check of one Heilbroner, and surrendered it to him, taking in payment the check of the plaintiff, which Heilbroner had obtained from the plaintiff by fraud. It was held that the plaintiff could not

recover the amount of his check from the defendant, who had no knowledge of the fraud.

In opposition to this array of authorities the learned counsel for the appellant cites the following:

Wilson *vs.* Smith, 3 How., 763.

People's Savings Bank *vs.* Bates, 120 U. S., 556.

Decan *vs.* Shipper, 35 Penna , 239.

Swift *vs.* Williams, 68 Md., 236.

Of these *Wilson* vs. *Smith* was relied on by the learned Justice at the Circuit Court and is hereinafter discussed.

People's Savings Bank vs. *Bates* is wholly inapplicable, the question not being as to the transfer of negotiable paper nor money, but the giving of a chattel mortgage.

Decan vs. *Shipper* was a case of a bill of lading void in its inception by reason of fraud, and is inapplicable.

Swift vs. *Williams* requires more comment. The facts in that case are complicated, and are not recited except in the opinion of the Court. It may readily be seen that the influencing consideration may perhaps be found in facts not specifically set forth.

But even on the facts stated in the opinion, the case can be distinguished from the case at bar. It appears at p. 247 that the check to the creditor was signed by two persons as trustees, whereas the debt was due to him from a trust fund held by a single trustee. He therefore had notice that he was being paid from the wrong fund.

So far as the decision sustains (if at all) the proposition that a creditor, receiving a check in payment of a *bona fide* antecedent debt, and without notice of a breach of trust upon the part of the debtor, may be made to refund such payment, this Maryland case stands absolutely alone

and in opposition to the unanimous decisions of the courts of every other jurisdiction, so far as we have been able to ascertain through a careful investigation. The briefs there submitted to the Court do not call attention to the numerous adjudications holding the contrary view, and this decision has never been followed, nor been even cited, in any other jurisdiction, nor do we find that it has been made the basis of any subsequent adjudication even in that Court.

As a learned writer upon the law has aptly said, "Hard cases make bad law," and perhaps the explanation of this anomaly in the current of judicial decisions may be traced to this source.

The Cases Cited by the Circuit Court.

The learned Justice, presiding at the Circuit Court, in his opinion cited only two cases as authority for his decision. These were *Wilson* vs. *Smith*, 3 Howard, 763, and *National Bank* vs. *Insurance Co.*, 104 U. S., 54. Both cases can be readily distinguished from the one at bar. In one case the person receiving and retaining the moneys was not a holder for value; in the other case he was expressly found to have notice of the equities af the plaintiff.

Wilson vs. *Smith*, 3 How., 763:

The plaintiffs were the owners of a draft or bill of exchange drawn by one Holcombe, of Augusta, upon one Mills of Savannah. This draft the plaintiffs placed in the hands of their agent, St. John, at Augusta, Ga., for collection, and it was by him forwarded to the defendant, who was the agent of St. John at Savannah, Ga., for acceptance and collection. The defendant collected the

draft, but, St. John having failed in business and being indebted to the defendant, the defendant applied the money upon this indebtedness. The plaintiff then brought an action to recover the amount of the draft from the defendant. A question arose as to whether there was sufficient privity of relationship between the plaintiff and defendant to enable the plaintiff to bring such an action, and a division of opinion having arisen, the question was certified to the Supreme Court. Upon this question the Court decided in the affirmative. Upon the argument, the further question arose as to whether the defendant had the right fo retain the moneys in question on account of the money due to him from St. John.

From the statement of facts it is not clear whether or not the defendant knew that St. John, in forwarding to him the draft in question, was acting as agent or in his own right. It is stated, however,

> "that the draft or bill of exchange was made payable to the order of Henry B. Holcombe, the drawer, and by him endorsed in blank, and endorsed by St. John to H. Smith, Esq. (the defendant) or order. That when the draft was sent to the defendant for collection he was not apprised to whom it belonged, nor were any instructions or directions given to him as to the disposition of the money when collected."

The Court held that the defendant was not entitled to retain the money, upon the ground that no new advances were made by him and no new credit given to St. John on account of this bill. The Court says (p. 770):

> "Now, if St. John had owed him nothing, upon the principles we have already stated the plaintiff would be entitled to recover the money, and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case

shows that he incurred no new responsibility upon the face of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him."

This question was not regularly before the Court, and its opinion upon this point was a dictum. Even if authority, it is not applicable to the case at bar, because the facts are radically different. The Missionary Society was not the agent of Thompson, and did not receive his check for the purpose of collecting it for his account, but received it in actual payment of an existing debt. Furthermore, the doctrine of this case is not wholly consistent with that of *Swift* vs. *Tyson*, 16 Pet., 1, which is the leading case upon the subject, and has been consistently followed by the Federal Courts.

National Bank vs. *Insurance Co.*, 104 U. S., 54:

The appellant National Bank had its office in the City of Baltimore, and among its depositors was one A. H. Dillon, Jr., who was General Agent for the Connecticut Mutual Life Insurance Company of Hartford, having his office across the street from the Bank. Dillon's account with the Bank was designated on its books as follows:

"*Dr.* Central National Bank in Account with A. H. Dillon, Jr., General Agent. *Cr.*"

This account was opened April 1st, 1871. Previous to opening it Dillon opened another account in the name of his wife, and subsequently an account in his individual name. In the following year, Dillon obtained from the Bank a personal loan, which was renewed from time to

time, the last renewal being in December, 1873, at which time a note for $10,000 was given, dated November 29th, 1873, payable six months from date, and signed by both Dillon and his wife individually. This note not being paid on maturity, the bank charged it against the account of A. H. Dillon, General Agent. Dillon was ignorant of the fact, and continued to make deposits and drafts to his account as agent of the Insurance Company until the account was closed June 12th, 1874.

The action was brought by the Insurance Company to recover moneys which Dillon had collected as its agent and deposited with the Bank in the agent's account above referred to.

Judgment was rendered in favor of the Insurance Company, and, upon appeal, this was affirmed. The Court, per Mr. Justice Matthews, said (p. 62):

> "It is claimed further, in support of the Bank's position, that the discount of the note, afterwards charged to this account, was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. * * * We find it also to be fully proven that the Bank knew that Dillon was the agent for the Insurance Company; that it was his business and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account with him as General Agent was opened in that way, to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted, by checks on that account, and that they constituted much the larger part of the fund which they entered into.
>
> "It will be observed that the question arising here is *not* what the rights of the parties would be if the note had been taken up by Dillon's check upon that

account, the Bank having no knowledge of its character except from what might be inferred from the use of the words 'General Agent' at its head. Here the attempt is made, *with the actual knowledge which we find imputable to the Bank*, and without Dillon's assent, to pay itself the overdue note out of the funds for which, as agent for the Insurance Company, he was bound to account to it."

FOURTH POINT.

The defendant Missionary Society, having received the proceeds of Thompson's check without notice of the source from which they came, had actually expended these proceeds in pursuance of the directions of Doctor Saul's will before receiving notice of the Complainant's claim.

If the defendant Society received Thompson's check for value and without notice, as shown in the Second Point of this brief, it is immaterial whether the proceeds had been disposed of, so far as the complainant's claim is concerned. It might stop there and its defense would be complete.

As matter of fact, however, the transactions of the Society stand on a different footing from those of an individual or of a business corporation. The Society received no personal advantage from the receipt of these moneys from Thompson.

The legacy from Doctor Saul directed the moneys to be paid to the Society to be expended for certain specified missionary purposes. The Society applied them to these purposes as soon as received. It took the moneys in a quasi-trust capacity and expended them before notice of

the complainant's claim. The complainant now asks that the Society be compelled from its other funds to reimburse him for the moneys so received and expended.

The Society's income is derived chiefly from voluntary contributions, legacies, and offerings of churches and Sunday schools. If the complainant's claim be sustained, he must be paid from moneys received from such sources as these. The moneys received from the Saul legacy are gone beyond recall.

Thompson delivered the check to the defendants on June 19th. They deposited the check on the next day, and did not receive Holly's notice alleging that they had been paid money belonging to him until July 18th, 1890, the notice having been mailed on the 17th, as appears from the testimony of Holly's attorney (p. 96).

On the 20th day of June their balance at the bank was $43,569.83, as appears by the bank account (p. 116). From that time until July 18th, the day on which they received the notice, the checks drawn out amounted to $88,589.74 (pp. 116–122), being far more than the aggregate of Thompson's check and the balance on hand on the day that it was received. As the money has no ear-mark the only way to trace any particular amount in a general account of this character is to apply the first item on the credit side to the first item on the debit. It is thus evident that Thompson's check for $15,577.54 was paid out many days before Holly's notice was given to the Society. These checks were all drawn out to meet disbursements authorized and approved by the Society long before. (Testimony Dr. Kimber, p. 143, *et seq.*, and 146, *et seq.*)

The fundamental rule of legal accounting requires that the first debit should be charged against the first credit. (U. S. *vs.* Kirkpatrick, 9 Wheaton, 720; Thompson *vs.* St. Nicholas Bank, 113 N. Y., 325, 333; Morse on Banks and Banking (2nd ed., 32). Consequently we must exhaust the balance on hand at the time of Thompson's checks before taking up any latter deposit:

Balance on hand June 20/90	$43,569.83
Amount deposited June 20/90, including Thompson's check	16,540.26
Total	$60,110.09
Checks drawn out from June 20/90 to July 18/90, inclusive	$88,589.74
Excess of expenditure over balance and deposit	$28,479.65

The defendant made no effort to conceal any fact relative to the cause, and at considerable labor had prepared statements showing all of the checks drawn by the Society during the period from June 1st, 1890, to August 1st, 1890, and subdividing them so as to show which of them went into the account of Domestic, Foreign and Colored Missions and general office expense accounts, respectively. These statements show the date of each check, the name of the person to whom drawn and the amount, and the account to which it is chargeable (p. 147). Pursuant to stipulation, these documents are not printed in full, but may be produced upon the hearing of the cause (p. 147).

The learned Judge in the Circuit Court referred to this proof in the following language (p. 183):

> "Some suggestion is made that this was received as a charitable bequest and so applied, that it is gone

beyond reach and cannot be recovered, but defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul or otherwise than as it would use its general funds in furtherance of its objects, nor that any of this particular money was applied to any of its purposes."

By his will Dr. Saul bequeathed his property to the defendant Missionary Society, to be "appropriated in equal proportions, one-third to Domestic Missions, one-third to Foreign Missions, one-third to the benefit of the colored people in the Southern or formerly slave States, for the support of schools and missions" (p. 54).

Mr. Roberts testified (p. 223) that upon the very memorandum which accompanied the check received from Thompson, there was written by him: "Legacies, Pa. Phila., Estate of Rev. James Saul, D.D., 1/3 Domestic equals $5,192.52; 1/3 Foreign equals $5,192.51; 1/3 colored equals $5,192.51."

The receipt of this money is similarly acknowledged in the Treasurer's Report as being applicable and actually applied to the three classes of missions specified (p. 159).

It appears by the testimony of Dr. Kimber (pp. 144, 145) that the various missions are supported by moneys paid out by the Society under appropriations made from time to time by the Board of Missions. For the year ending September 1, 1890, appropriations were made according to a specified schedule (p. 168) and similarly for Foreign Missions and Colored Missions (p. 170).

These schedules provided

For domestic missions	(p. 169)	$174,355.00
" foreign "	(p. 170)	151,553.23
" colored "	(p. 170)	40,000.00

Dr. Kimber testified (p. 149):

> "These resolutions having been passed, then, as I understand it, the practice of the executive officers of the Board of Missions is to go on with the prosecution of the work outlined by these appropriations? A. Yes, sir, certainly."

On June 10, 1890, a resolution was passed by the Board of Missions in the following terms (pp. 145, 170):

> "RESOLVED, that the Treasurer be instructed to apply so much of the gross amount received from Domestic and Foreign and general legacies to Sept. 1, 1890, as may be required toward the appropriations for corresponding work to the same date."

It was under the authority of this resolution that all payments were made by the defendant Society between June 10, 1890, and September 1, 1890. The payments so made between June 19th and July 18th, 1890, aggregated more than the aggregate of Thompson's check and the balance on hand when it was received.

These payments were subdivided and stated in full in separate lists under the respective headings of Domestic Missions, Foreign Missions, Colored Missions and General Expenses (p. 146).

The money received by the Society from Thompson was immediately deposited by the Society and drawn against and used in the payment of these appropriations, as appears by Defendant's Exhibits A, B, C, D and E, put in evidence at page 147.

This use was in exact compliance with the conditions upon which it was bequeathed.

FIFTH POINT.

The bill was properly dismissed and the judgment should be affirmed.

Dated New York, December 1st, 1900.

JULIEN T. DAVIES,
HERBERT BARRY,
Of Counsel for Respondent.

Supreme Court of the United States.

No. 138.—October Term, 1900.

James Holly, Petitioner,
vs.
The Domestic and Foreign Missionary Society of the Protestant Episcopal Church and E. Walter Roberts.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 25, 1901.]

This was the case of a bill in equity filed in January, 1891, in the Circuit Court of the United States for the Southern District of New York, by James Holly, a citizen of the State of Pennsylvania, against the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation of the State of New York, and E. Walter Roberts, treasurer of the same.

The case came to issue on bill, answer and replication. Evidence was adduced by the respective parties, and certain exhibits and stipulations were filed.

The principal facts disclosed by the pleadings and evidence were these:

On December 23, 1887, the last will of Rev. James Saul, D. D., was duly proved and letters testamentary thereon granted by the register of wills in and for the city and county of Philadelphia to Rev. Benjamin Watson, D. D., and Henry C. Thompson, executors named in said will. In and by said will the testator bequeathed the whole of his estate to "the following institutions and in the following proportions, viz., to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, three-fourths of the whole of my said estate, conditioned that the amount thus bequeathed shall be appropriated by said society in equal proportions of one-third to domestic missions, one-third to foreign missions and one-third to the benefit of the colored people in the Southern or formerly slave States for the support of schools and missions." The remaining one-fourth of the whole of the said estate he gave and bequeathed to the Theological Seminary near Alexandia, Virginia. By a codicil the bequest to the theological seminary was revoked, the testator having substituted therefor a donation of one hundred shares Pennsylvania Railroad stock, and which he had transferred to the trustees of the seminary; and by a later codicil, the testator further gave and devised to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America all the residue of his estate.

Neither the amount of the estate, nor the property of which it consisted, was mentioned in the will or codicils; but it appeared that, in addition to about $2,493.03 cash, the testator was possessed of bonds of the North Pennsylvania Railroad Company and of the United Railroads of New Jersey, and in their account filed in the orphans' court of Philadelphia County the executors charged themselves with $17,268.03 as the amount of the estate. This account was confirmed on November 5, 1889, showing a balance in the hands of the executors of $14,927.54, which was awarded by the court to the Domestic and Foreign Missionary Society.

On June 19, 1890, the executor, Henry C. Thompson, called at the office of the defendant society in New York city, and handed to Roberts, the treasurer, a memorandum showing the above balance $14,927.54 awarded to the society by the decree of the orphans' court, from the Saul estate, and $650 dividends received since and not included in the account, making a total of $15,577.54. For this sum Thompson gave a check in the following words and figures:

$15,577.54 "PHILADELPHIA, *June* 19, 1890.

THE UNION TRUST COMPANY,
Nos. 715, 717, 719 Chestnut Street.

"Pay to the order of the Domestic and Foreign Miss. Soc. of the P. E. Church fifteen thousand five hundred seventy-seven $\frac{54}{100}$ dollars.
No. 623. H. C. THOMPSON."

Roberts, the treasurer, handed Thompson a receipt, as follows:

"NEW YORK, *June* 19, 19 .

"Received from executors estate of James Saul, late of Philadelphia, Pennsylvania, fifteen thousand five hundred seventy-seven $\frac{4}{100}$ dollars ($15,577.54).

GEORGE BLISS, *Treasurer*,
per E. WALTER ROBERTS, *Assistant Treasurer*."

Thompson's check was deposited by Roberts, treasurer, in the Bank of New York, for general account of the Foreign and Domestic Missionary Society of the Protestant Episcopal Church in the United States of America, by which bank the check was forwarded for collection to the Bank of North America of Philadelphia, and was to that bank paid, on June 21, 1890, by the Union Trust Company of Philadelphia.

The proceeds of this check were deposited in the general bank account of the Missionary Society, and were applied, with other moneys of the society, to domestic, foreign and colored missions, before the society was notified of the claim asserted in the bill of complaint.

In May, 1890, James Holly, a resident of Philadelphia, bought at auction for $12,000 a house and lot situated upon North Fifteenth street in that city. He took the title papers to H. C. Thompson, who had previously been employed by him, and requested Thompson to have proper

conveyances made. As some of those interested in the sale resided elsewhere there was some delay in getting the papers signed. Finally, on June 19, 1890, Holly called on Thompson, who told him that the papers were ready, and asked for a check to meet the purchase money. Thereupon Holly gave him a check in the following form:

"PHILADELPHIA, *June* 19, 1890.

"The Fidelity Insurance, Trust & Safe Deposit Co., pay to Henry C. Thompson, attorney, or order, twelve thousand dollars.
$12,000. JAMES HOLLY."

And Thompson gave Holly a receipt, as follows:

"PHILADELPHIA, *June* 19, 1890.

"Received from James Holly, twelve thousand dollars, and J. A. Freeman's receipt for $200, to be applied to purchasing house, No. 643 North Fifteenth street.
$12,000. (Signed) H. C. THOMPSON."

Holly never afterwards saw Thompson, but on July 15, 1890, was informed by Morgan, one of the vendors of the property purchased, that Thompson was lying at a hospital in Jersey City, where he had attempted suicide.

Taking alarm Holly consulted Mr. Burton, as an attorney, and it was discovered that Holly's check on the Fidelity Insurance, Trust & Safe Deposit Company in favor of Thompson for $12,000, dated June 19, 1890, had been by Thompson that day deposited in the Union Trust Company, Philadelphia, and that, by a check of June 19, 1890, in favor of the Domestic and Foreign Missionary Society of the P. E. Church in the United States of America, Thompson had drawn out $15,577.54, leaving a balance in his favor of $72.41.

According to the finding of the Circuit Court this check in favor of the Domestic and Foreign Missionary Society was, to the extent of $10,028, paid by the Union Trust Company out of the moneys realized from Holly's check to Thompson; and that court decreed against the Missionary Society in favor of the complainant for that amount. (— Fed. Rep. ——.)

Upon appeal the decree of the Circuit Court was reversed by the Circuit Court of Appeals for the Second Circuit, and the bill directed to be dismissed, (—Fed. Rep. ——;) and thereupon the case was brought to this court by a writ of certiorari.

Mr. Justice SHIRAS delivered the opinion of the Court.

This is a case in which a court of equity is called upon to decide upon which of two innocent parties is to fall a loss caused by the dishonesty of a third person. The relation that existed between Thompson and the Missionary Society was that of executor and legatee; between Thompson and Holly, that of attorney and client. As between themselves, Holly and the Missionary Society were absolute strangers.

Our examination of the pleadings and evidence fails to show any such dereliction of duty or supine negligence on the part of the Missionary Society in demanding and enforcing payment of the Saul legacy as would show, or even tend to show, that the society knew, or had reason to believe, that Thompson was insolvent, or had been guilty of any misappropriation of the property or funds of the Saul estate. It is true that the legacy was not paid as promptly as the society had reason to expect, but there was nothing unusual about such a delay.

The very fact that Rev. Dr. Saul had selected Thompson to be one of his executors authenticated him to the society as a trustworthy person, and while it is true that Rev. Mr. Watson, who was a co-executor, in letters answering inquiries by the secretary of the society in April and May, 1890, admitted that Thompson was dilatory in settling the estate, there was nothing to justify suspicion on the part of either Mr. Watson or of the society that there was anything wrong in Thompson's dealings with the estate. Accordingly we are fully satisfied that, when Thompson called upon the society at the New York office, on June 19, 1890, and paid the amount shown to be due the society by the account of the executors in the orphans' court of Philadelphia County, approved November 23, 1889, together with the additional sum of $650 received after and not included in the account, there was nothing, either in the previous transactions, or in the form of the payment by Thompson's check, to put the society upon notice, or to have justified the treasurer in refusing to accept the payment. When Thompson's check was paid the following day and the proceeds had gone into the bank account of the Missionary Society, the matter was fully closed between the executors of Saul's estate and the society.

Beyond this, we think the evidence fairly shows that the Missionary Society had appropriated and expended the money so received, to the purposes appointed by the testator, before any notice was given of the complainant's claim. While such use and application of the money might not exonerate the society from liability, if they had received the money in circumstances that visited them with notice of Thompson's dishonest conduct towards Holly, yet if the money, received in good faith by the legatee, had actually and *bona fide* been applied and expended for the use of the beneficial purposes appointed in the will, without knowledge of Holly's claim, or, indeed, that such a man existed, we think a court of equity would refuse to hold the society as a trustee *ex maleficio*.

The learned judge of the Circuit Court, speaking of this aspect of the case, does indeed say:

"Some suggestion is made that this was received as a charitable bequest, and so applied that it had gone beyond reach, and cannot be recovered. But the defendant has not shown that this particular money has been applied to any particular purpose as coming from Saul, or otherwise than as it would use its general funds in the furtherance of its objects, nor that any of this particular money was applied to any of its purposes."

If this statement is to be understood to mean that the money, bank notes or specie, actually received on Thompson's check, was not immediately and in form applied to the beneficial purposes named in Saul's will, it may be true; indeed, it appears that the proceeds of Thompson's check were paid into the Bank of New York for general account of the Missionary Society, and that thus the identity of the bank notes or specie was lost in the credit account of the society in that bank. But it is not perceived that such a state of facts disabled the society from having the advantage of showing that money to an equal amount was appropriated and applied by them, out of their general account, to the purposes appointed by the testator. To demand that such a society should make special deposits of legacies received, so as to be able to trace the application of such deposits into the hands of beneficiaries in the same form as when received, would be, in the highest degree, unreasonable.

If, however, the meaning of the learned judge was that it did not distinctly appear that the Missionary Society had appropriated and applied an amount of money equal to that received from the Saul estate to the purposes appointed in the will before any notice was received of Holly's claim, we are constrained to decline to dissent from such a view.

In the bill of complaint the defendants were explicitly called upon to answer under oath whether, and in what circumstances, they had received money from Thompson, and particularly whether such money had been received as coming from the estate of James Saul, deceased, and whether they had not received a letter from plaintiff's attorney, on or about July 17, 1890, notifying them that the moneys so received by the defendants through Thompson's check came from moneys belonging to Holly. To these allegations and interrogatories the defendants answered, denying any knowledge or belief on their part of the transactions between Thompson and Holly "until long after the receipt by defendants and expenditure of the $15,577.54 referred to; and these defendants, further answering, allege that at the time of the notification hereinbefore referred to and the receipt by the defendant society of the letter from plaintiff's attorney, these defendants had expended, in the usual course of their business and according to the will of the said Rev. James Saul, the said sum of $15,577.54."

To this portion of the answer the plaintiff filed exceptions for insufficiency, as follows:

"In not stating how the defendants have expended the $15,577.54, what the items of expenditure were and the respective dates of such items of expenditure, and how and in what respect the said moneys were expended according to the will of the Rev. James Saul, deceased, and what was the usual course of business of defendant's society in making said expenditure of said moneys, whether the same was expended by standing order or special resolution of the board of managers of the society defendant, or otherwise."

Thereupon the defendants, responding to these exceptions, filed a supplemental answer, as follows:

"These defendants, further answering, allege that the moneys received as aforesaid from Henry C. Thompson, executor, were expended by the defendant society for domestic missions, foreign missions and for the benefit of colored people in the Southern, or formerly slave, States, for the support of schools and missions, through its officers, acting partly under the general direction of the board of managers and partly under a resolution of said board passed on the tenth day of June, 1890, authorizing the treasurer to apply such legacies as might be received before September 1, 1890, to the payment of appropriations to September 1, 1890—of which resolution a copy is hereto annexed and marked 'P.'"

The copy of the resolution was as follows:

"Resolved, that the treasurer be instructed to apply so much of the gross amount received from domestic and general legacies to September 1, 1890, as may be required toward the appropriations for corresponding work to same date."

It was also made to appear that, on June 20, 1890, the balance in bank to the credit of the Missionary Society was $43,569.83. On that day the balance was increased by the proceeds of Thompson's check $15,577.54 and other money to $60,110.09; and that, by checks drawn between June 20 and July 18, the day on which the letter of Holly's attorney was received, the sum of $88,589.74 was drawn out; aggregating more than the sum of Thompson's check and the balance on hand when it was received, and it was shown that these payments were on account of domestic, foreign and colored missions and office expenses.

It is true that, owing to further receipts between June 20 and July 18, 1890, there was a balance on hand in bank on the latter day, but those receipts were themselves trust funds, contributed and held for the charitable purposes of the society. It need scarcely be said that a court of equity will not interfere with the proper application of such funds by constraining the society to divert them to relieve Holly. This, of course, was not the case of a running account between debtor and creditor, where the general rule is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. Here there was no relation of debtor and creditor between the Missionary Society and Holly, and the latter cannot be heard to complain of the application by the society of the money received from Thompson, executor, to the purposes prescribed by the testator, nor to demand that moneys subsequently received by the society from third persons for specific charitable purposes shall be used to indemnify him from loss occasioned by trusting his money with his attorney.

From the numerous cases cited we think it sufficient to refer to two or three which resemble in their facts the case in hand, and in which were laid down principles now applicable.

Stevens v. *Board of Education,* (79 N. Y. 183,) was a case where one Gill, who was a member of the board of education of the city of Brooklyn, had converted to his own use the money of the board, and so became indebted to it in the amount thus subtracted. Gill forged a mortgage upon the land of another and sold it to Stevens, receiving from him the proceeds and depositing them to his own credit. He then drew a check for the amount of his debt to the board of education, and with it paid that debt in full. The court held that Stevens could not recover the money from the board, saying:

"It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of his payer. Money has no earmarks. The purchaser of a chattel or chose in action may by inquiry in most cases ascertain the right of the persons from whom he takes the title; but it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests a title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good between the parties, it is good as to all the world. 'Money,' said Lord Mansfield in *Miller* v. *Race,* (4 Burr. 452,) 'shall never be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business.'"

In *Hatch* v. *National Bank,* (147 N. Y. 184,) the agent of Hatch procured a loan upon stock which he had fraudulently converted. He then with the money thus procured paid an antecedent debt which he owed to the bank. The court said:

"This doctrine goes upon the broad ground that money has no earmarks, that in general it cannot be identified as chattels may be, and that to permit in every case of a debt an inquiry as to the source from which the debtor derived the money and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines, as between innocent parties, upon whom the loss should fall under the existing circumstances."

In *State Bank* v. *United States,* (114 U.S. 401,) it was held that where, by the connivance of a clerk in the office of an Assistant Treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and to replace it pays to the clerk money which

he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the money to the bank.

The case made out for the appellant Holly does not require extended notice.

Let it be conceded that he was not, in the circumstances, estopped from following his money into the hands of the Missionary Society, by having entered an attachment against Thompson for a fraudulent conversion of his money; let it also be conceded that, by trusting his money with Thompson, who had theretofore been his attorney, and whose standing in the community was good, he was not guilty of conduct so reckless and negligent as to, of itself, deprive him of a remedy; yet his case fails in the essential particular that he has not shown that the Missionary Society, in receiving from Thompson, executor, the money due from the estate of Rev. Dr. Saul, and in applying it in accordance with the appointments in the will, acted with any notice or knowledge, actual or imputable, that Thompson was misapplying funds intrusted to him by a third person with whom the society had no relations whatever. As against the Missionary Society, Holly, in the circumstances disclosed, has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent.

The decree of the Circuit Court of Appeals of the Second Circuit is

Affirmed.

Mr. Justice BREWER did not hear the argument or take part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.